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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1595. 1171

THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN FITZGERALD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED MARCH 27, 1890.

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a In the Supreme Court of the United States.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Plaintiff in Error,
vs.
JOHN FITZGERALD, Defendant in Error.

The defendant in error hereby waives the issuance and service of citation herein and hereby enters his appearance and consents that the said cause be put on the docket of said Supreme Court for hearing on the 2nd Monday in Oct., 1890, and that the same shall be submitted on printed brief and argument, oral argument being hereby waived, plaintiff's brief to be served by June 1, 1890, and defendant's brief by Sept. 1, 1890, plaintiff to have until Sept. 20, 1890, to reply thereto.

B. P. WAGGENER,
Att'y for Pl'tiff in Error.
T. M. MARQUETT,
Attorney for Defendant in Error.

b In the Supreme Court of the United States.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Plaintiff in Error,
vs.
JOHN FITZGERALD, Defendant in Error.

Assignment of Error of The Fitzgerald and Mallory Construction Company, Plaintiff in Error.

Now comes the said The Fitzgerald & Mallory Construction Company and assigns the following errors, which it desires to have reviewed by the Supreme Court of the United States, viz:

1. That the court erred in overruling and denying the plea in abatement filed by the defendant to the jurisdiction of the court.

2. The said circuit court erred on the trial of said case in overruling and denying the motion of the said defendant for a nonsuit.

3. The said court erred in retaining the jurisdiction of said case when it was made to appear that the original service of process upon said defendant was the result of a trick, subterfuge, and device resorted to by the said plaintiff, John Fitzgerald, for the purpose of obtaining service of a summons upon the defendant, The Fitzgerald & Mallory Construction Company, a foreign corporation.

4. The said court erred in permitting the plaintiff to prove
c on the trial of said case the alleged reasonable value of services performed by him while discharging the usual and ordinary duties of general manager of the Fitzgerald & Mallory Conruction Company.

5. The said court erred in permitting the witness, D. J. Thayer, over the objection and subject to the exception of the defendant, to

testify that the services of said plaintiff, John Fitzgerald, were worth from $8,000 to $12,000 per year.

6. The court erred in permitting any evidence of the value of the services of said John Fitzgerald, as vice-president, treasurer, or general manager of said company, in the absence of an express contract between him and said company.

7. The court erred in refusing to instruct the jury, upon request of the defendant, as follows, viz:

"The jury are instructed that in the absence of an agreement the plaintiff is not entitled to any compensation for services performed, either as vice-president, treasurer, or general manager."

8. The said court erred in its general charge to the jury as follows, viz:

"That if Fitzgerald, the plaintiff, acted as superintendent, treasurer, or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant, it seems to me that there would be an implied agreement on the part of the defendant company to pay what these services were reasonably worth."

9. The said court erred in instructing the jury in in its general charge as follows, viz:

"If Mr. Fitzgerald performed the services that usually devolve on the general manager, if he devoted his time, talents, and energies to that particular business, it seems to me that there would be an implied agreement."

d 10. The said court erred in its general charge to the jury as follows, viz:

"You can fix such allowances for his services from the 1st of May, 1886, to the 3rd day of November, A. D. 1886, as may from the evidence appear to be just and reasonable."

11. The said court erred in its general charge to the jury as follows, viz:

"It may be that there was an implied agreement if there was no express agreement on the part of the defendant to pay him whatever reasonable expenses might be incurred in going from place to place and looking after their business."

12. And the said court erred in refusing to give the following instructions requested by the defendant, viz:

"The jury are instructed that under the charter of the defendant company the president, S. H. Mallory, had no authority to borrow money and execute the notes of the company therefor."

13. The said court erred in giving to the jury the following instruction, viz:

"And if it became necessary for the benefit of said company to execute promissory notes or to draw sight drafts, the said president would have ample authority to do the same."

14. The said court erred in giving the following general instruction to the jury, viz:

"And might likewise empower the cashier or party whose duty it was to ascertain the amounts due contractors, material men, and persons working upon the construction of said railroad or building

by the construction company to draw drafts or checks or even make promissory notes."

15. The court erred in refusing to give the following instruction in its general charge to the jury, viz:

e "The jury are instructed that none of the several notes sued upon constitute any evidence of debt against the defendant company for the reason that said S. H. Mallory, as president, and C. H. Lamb, as auditor of said defendant company, had no authority to execute the same."

16. The said court erred in giving the jury the following instruction, viz:

"If the jury believe from the evidence that the said S. H. Mallory, the president, was authorized to draw checks against the company, and as president was authorized as its agent to determine accounts against it, the jury would have a right to imply from these acts and recognitions of the board of directors that said Mallory had the right to execute the note or notes in question executed by him, &c., &c."

17. The court also erred in giving to the jury the following instruction, viz:

"You will find for the plaintiff in the full sum of said notes, with interest."

18. The said court erred in giving to the jury the following instruction, viz:

"As to the money due on promissory notes the jury are instructed that the law is as follows: If the money was fairly borrowed for the corporation and *that* notes were given for it, and the fund was honestly applied in payment of pressing liabilities of the company, and after the same was done the directors individually were advised of the transaction, it would be a perversion of the plain principles of reason and judgment to permit the validity of such security to be effectually denied, and if you find the facts to be as above stated you will find for the plaintiff the full amount of said promissory note and interest."

f 19. The said court also erred in that part of the general charge to the jury as follows, viz:

"Yet that does not necessarily make such formalities essential to the ratification of the contract entered into."

20. The said court also erred in giving the following instruction to the jury, viz:

"If you find from the evidence that the said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors of said construction company had full knowledge of the same and assented to the transaction—to the signing and execution of the notes—you will find that said acts of the president have been fully confirmed, and you will find for the plaintiff the full amount of said notes with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them."

21. The said court erred in refusing to give the following instruction asked by the defendant, viz:

"The jury are instructed that if they find from the evidence that

original service of summons was made on S. H. Mallory, as president, as a result of a trick under which said Mallory was induced to come into the State of Nebraska, and said fact was concealed from the said defendant by said plaintiff until on the trial of this case, then and in that event the suit was improperly brought, and you should find for the defendant."

22. The said court erred in rendering judgment on the verdict of the jury in favor of the plaintiff and against the defendant.

23. The said court erred in overruling and denying motion in arrest of judgment filed by the defendant.

g 24. The said court erred in overruling and denying the motion for a new trial filed by the defendant.

A duly certified transcript of the records and proceedings of the said circuit court on the trial of said case, with the bill of exceptions duly allowed, signed, and sealed by the judge of said court, is hereto attached as "Exhibit A" and made a part of this assignment of error.

Wherefore, and by reason of all of which errors aforesaid, the said plaintiff in error prays for a writ of error to the said circuit court of the United States in and for the district of Nebraska, and that the judgments and decisions of said circuit court shall be reversed, annulled, and set aside and all things held for naught.

B. P. WAGGENER,
Attorney for Defendant, The Fitzgerald & Mallory Con. Co.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of November, A. D. 1889.

Be it remembered that on the 2nd day of February, 1889, a transcript was filed in the office of the clerk of said circuit court; which said transcript is in words and figures following, to wit:

Transcript.

In the District Court within and for Lancaster County, Nebraska.

JOHN FITZGERALD
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY. } Petition.

The plaintiff, John Fitzgerald, complains of the defendant, The Fitzgerald & Mallory Construction Company, a corporation duly organized under the laws of the State of Iowa and doing business in the States of Nebraska, Iowa, and Kansas—

For that on the 31st day of July, 1888, the said Fitzgerald & Mallory Construction Company made its certain promissory note in writing of that date and delivered the same to the First National Bank of Lincoln, Nebraska.

The following is a copy of said note:

$5,002.80. LINCOLN, NEBRASKA, *July* 31*st*, 1888.

Ninety days after date, for value received, *I* promise to pay to the order of the First National Bank of Lincoln, Nebraska, five thousand and two and $\frac{80}{100}$ dollars, with interest at the rate of 10
2 per cent. per annum from date until paid.

(Signed) FITZGERALD-MALLORY CO'ST. CO.,
By S. H. MALLORY, *Pres.*

Negotiable and payable at the First National Bank of Lincoln, Neb.

No. 40434. Due Nov. 1st, 1888.

Endorsed on back as follows:

Pay to the First National Bank of Lincoln, Nebraska, or order, waiving demand of notice of non-payment, protest, and notice of protest.

S. H. MALLORY.
JOHN FITZGERALD.

Pay John Fitzgerald or order without recourse.

(Signed) JOHN R. CLARK, *Cashier.*

That when said note fell due, on the 1st day of November, 1888, the Fitzgerald & Mallory Construction Company failed to pay the same, and John Fitzgerald, endorser, who endorsed the same without any consideration, paid said note, and the same was transferred to him by the cashier as follows:

"Pay John Fitzgerald or order without recourse.

"JOHN R. CLARK, *Cashier.*"

The amount due and paid by said John Fitzgerald was the sum of $5.128.25, the same being paid on or about the 1st day of November, A. D. 1888. The said defendant has not paid said claim nor any part thereof, and there is now due to plaintiff thereon from the defendant the sum of $5,128.25, with interest from the 1st day of November, 1888, at 10 per cent., and for which amount plaintiff prays judgment.

Second Cause of Action.

For that on the 25th day of July, 1888, the said Fitzgerald & Mallory Construction Company made its certain promissory note in writing of that date and delivered the said — to J. J. P. Odell, cashier. The following is a copy of said note:

3 $15,290.24. NEW YORK, *July* 25*th*, 1888.

Sixty days after date we promise to pay to the order of J. J. P. Odell, cashier, fifteen thousand two hundred and ninety $\frac{24}{100}$ dollars, at seven per cent. interest, value received.

FITZGERALD & MALLORY CONST. CO.,
By S. H. MALLORY, *P't.*

Endorsed: John Fitzgerald, Lincoln, Nebraska. S. H. Mallory, Chariton, Iowa. Without recourse. W. T. Oakley, cashier.

That when said note fell due on the 25th day of September, 1888, the Fitzgerald & Mallory Construction Company failed to pay the same, and John Fitzgerald, endorser, who endorsed the same without any consideration, paid said note, and the same was transferred to him by the cashier as follows: "Without recourse. W. T. Oakley, cashier." The amount due and paid by said John Fitzgerald was the sum of $15,468.62, the same being paid on or about the 25th day of September, A. D. 1888. The said defendant has not paid said claim nor any part thereof, and there is now due to plaintiff thereon from the defendant the sum of $15,468.62, with interest from the 25th day of September, 1888, at 10 per cent., and for which amount plaintiff prays judgment.

Third Cause of Action.

For amendment to third cause of action plaintiff complains for that he was one of the promoters of the Fitzgerald & Mallory Co., and in view of the construction of said Co. he did work and labor during the year commencing May the 1st, 1885, and ending May the 1st, 1886, as a general manager in grading some 60 miles of railroad and in procuring municipal aid along the line of the Denver, Memphis & Atlantic R. R. Co., for which he was to receive a reasonable compensation, and that as one of the promoters he organized the Fitzgerald-Mallory Construction Co. and turned over to said Co. all of said work so performed and for which they afterwards received pay, and also all of the municipal aid so pro-
4 cured during said year. Said work was done in view of organizing said Co. Said Co. has received all the benefits of the same and has agreed to pay for the same; which said services so rendered were well worth the sum of $5,000 (five thousand dollars).

Plaintiff further complains for that on the 1st day of May, 1886, said defendant employed plaintiff to superintend the building of the Denver, Memphis & Atlantic R. R., and that said plaintiff worked for said defendant as said superintendent — manager in the construction of said railroad from the 1st day of May, 1886, to the 4th of November, 1886; also acted during that time as treasurer of said Co., and was to great expense and trouble as said treasurer and superintendent or manager, and that his services for the same are well worth the sum of $6,000 (six thousand dollars), for which he prays judgment & interest.

Fourth Cause of Action as Amended.

Plaintiff complains for that on or about the 1st day of November, 1886, the said defendant employed plaintiff as general manager on the contract with the Denver, Memphis & Atlantic railroad in constructing said road on the agreed salary of $5,000 per year; that plaintiff performed the services and worked for said company for

the year following, to wit, from November 1st, 1886, to November 1st, 1887, for a portion of which he has received a voucher; that he duly performed all the services agreed upon to be performed, and that there is now due him for said year's labor the sum of $5,000, with interest from the 1st day of November, A. D. 1887, at seven per cent. per annum.

Fifth Cause of Action as Amended.

Plaintiff further complains that in pursuance of the said contract by which plaintiff was to receive $5,000 per year as general manager in the construction of the Denver, Memphis & Atlantic railroad, that being the price agreed upon by him and defendant, he rendered the services under said contract and in pursuance of the same commencing November 1st, 1887, and running to May 1st, 1888; that all the services agreed upon were performed, and that he holds a voucher for a portion of the same; that there is now due to said plaintiff for said services which is not paid the sum of $2,500, with interest from May 1st, 1888, at seven per cent. per annum.

Sixth Cause of Action.

The plaintiff further complains of the defendant for that at the time stated in the following account he sold and delivered to the defendant, at defendant's request, the following goods, chattels, and personal property, to wit:

John Fitzgerald to the Fitzgerald & Mallory Construction Co.

JUNE 10TH, 1886.

175 drag-scrapers at $5 per scraper	$875 00
9 railroad plows at $20 per plow	180 00
23 wheel-scrapers at $20 per scraper	460 00
Making in all	$1,515 00

The said defendant agreed to give the above prices and agreed to give for the above goods and chattels the sum of $1,515.00. There is now due from the defendant to the plaintiff thereon the sum of $1,515.00, with interest thereon from the 10th day of June, 1886, at 7 per cent. interest, from which plaintiff prays judgment.

Seventh Cause of Action.

The plaintiff complains of the defendant for that at the time stated in the following account he sold and delivered to the defendant, at the defendant's request, the following goods and chatttel, to wit:

John Fitzgerald to the Fitzgerald & Mallory Construction Co.

MAY 7TH, 1887.

For track-laying tram shipped to the Fitzgerald & Mallory Construction Co., at Chetopa	$1,500 00

6 The price affixed to the above item was the one agreed upon by the plaintiff and defendant, and there is now due from the defendant to the plaintiff thereon the sum of $1,500.00, with interest on the same from May 7th, 1887, for which plaintiff prays judgment.

Eighth Cause of Action.

The plaintiff complains of the defendant for that, as its agent and employé in the construction by the defendant of the Denver, Memphis & Atlantic railroad and work done for the defendant in and about said work during the year 1886, plaintiff expended and paid out for the use of said defendant, at defendant's request, as his personal expenses, the sum of $396.65, which sum the defendant agreed to pay to the plaintiff; that on or about the 1st day of January, 1887, plaintiff and defendant had a settlement as to the amount so paid out by plaintiff for the year 1886, and found that the amount of money so paid out was the sum of $396.65; that no part of the same has been paid, and there is now due from the defendant to the plaintiff the sum of $396.65, with interest from the 1st day of January, A. D. 1887, for which amount plaintiff prays judgment.

Ninth Cause of Action.

The plaintiff complains of the defendant for that, as its agent and employé in the construction by the defendant of the Denver, Memphis & Atlantic railroad and work done for the defendant in and about said work during the year 1887, plaintiff expended and paid out for the use of said defendant, at defendant's request, as his personal expenses, the sum of $227.50, which sum the defendant agreed to pay to the plaintiff; that on or about the 1st day of January, 1888, plaintiff and defendant had a settlement as to the amount so paid out by plaintiff for the year 1887, and found that the amount of money so paid out was the sum of $227.50.

7 That no part of the same has been paid, and there is now due from the defendant to the plaintiff the sum of $227.50, with interest from the 1st day of January, A. D. 1888, for which amount plaintiff prays judgment.

Tenth Cause of Action.

Plaintiff further complains of the defendant for that on April 28th, 1888, said defendant drew its sight draft as follows:

The Fitzgerald & Mallory Construction —. Capital stock, $1,500,000.00.

$5,500.00. ST. LOUIS, MO., *Apr. 28th*, 1888.

On demand pay to the order of S. H. Mallory fifty-five hundred dollars, with interest at the rate of 10 per cent. per annum.

To the F. & M. Construction Co., St. Louis, Mo.

(Signed) THE FITZGERALD & MALLORY CONSTRUCTION CO.,
By C. H. LAMB, *Auditor.*

Said draft was duly accepted as follows:

"Payable at First National Bank, at Chariton, Iowa."

(Signed) S. H. MALLORY, *President.*

The following payments were made and endorsed: "Paid on the within $3,712, July 30th, 1888."

A demand was duly made upon the said Fitzgerald & Mallory Construction Company and upon S. H. Mallory and payment refused by the Fitzgerald & Mallory Construction Co. for want of funds; that in and for a valuable consideration the said draft has been assigned to plaintiff, he paying the full amount of $1,928.00 for the same.

Plaintiff further alleges that said defendant has not paid the said claim nor any part thereof, except as above stated, and there is now due to the plaintiff thereon from the defendant the sum of $1,928.00, with interest from the 30th day of July, 1888, at 10 per cent., for which amount plaintiff prays judgment.

8 *Eleventh Cause of Action.*

Plaintiff further complains of defendant for that on the 30th day of July, 1888, the said defendant made its certain promissory note in writing of that date, and delivered the same to the First National Bank of Chariton, Iowa. The following is a copy of said note:

$5,000.00. CHARITON, IOWA, *July 30th*, 1888.

On demand, after date, for value received, we jointly and severally promise to pay to the order of the First National Bank of Chariton five thousand dollars, at its banking-house, in Chariton, Iowa, with interest after date at the rate of ten per cent. per annum, and if this note is not paid at maturity we also agree to pay all reasonable attorneys' fees incurred in or attending the collection of the same, and that interest shall draw the same rate as principal.

(Signed) FITZGERALD & MALLORY CONSTRUCTION COMPANY,
By C. M. LAMB, *Auditor.*

Due on demand.

Endorsed: Interest paid to October 1st, 1888. Interest paid to Nov. 22nd, 1888. S. H. Mallory.

Endorsed: Trust. First National Bank, Chariton, Iowa. T. R. Crocker, cashier.

That payment on said note has been duly demanded at the First National Bank of Chariton and at the office of the Fitzgerald & Mallory Construction Company, in Chariton, Iowa, and payment refused.

Plaintiff alleges that in and for the full value of said note the same was endorsed to him, and that he is now the owner of the same, and there is now due to plaintiff thereon from the defendant the sum of $5,000, with interest from the 22nd day of November,

1888, at ten per cent. per annum, and for which amount, with a reasonable attorney's fee, plaintiff prays judgment.

9 *Twelfth Cause of Action.*

Plaintiff further complains of the said defendant for that on the 16th day of January, 1888, the said defendant made its certain promissory note in writing of that date and delivered the same to M. S. Cartter & Co. The following is a copy of said note:

$856.64. ST. LOUIS, *Jan. 16th*, 1888.

One hundred and twenty days after date we promise to pay to the order of M. S. Cartter & Co. eight hundred and fifty-six and $\frac{64}{100}$ —, for value received, payable at the Mechanics' Bank, at St. Louis, with interest from date at the rate of 7 per cent. per annum until paid.

(Signed) FITZGERALD & MALLORY CONST. CO.,
S. H. MALLORY, *Pres't.*

Endorsed: S. H. Mallory, M. S. Cartter & Co. M. S. Cartter, by U. S. Cartter, attorney. Pay First National Bank or order for collection, account Chariton Bank Commerce, St. Louis. Protest waived. T. C. Vanbloom, cashier.

Plaintiff is now the owner and holder of said note, and there is now due to plaintiff thereon from the defendant the sum of $856.64, with interest from the 16th day of January, A. D. 1888, at seven per cent., for which plaintiff prays judgment.

Thirteenth Cause of Action.

Plaintiff further complains of the said defendant for that on the 23rd day of November, 1888, the said defendant made its certain promissory note in writing of that date and delivered the same to the First National Bank of Chariton, Iowa. The following is a copy of said note:

$917.91. CHARITON, IOWA, *Nov. 23rd*, 1888.

On demand, after date, for value received, we jointly and severally promise to pay to the order of the First National Bank of Chariton nine hundred and seventeen $\frac{91}{100}$ dollars, at its
10 banking-house, in Chariton, Iowa, with interest after date at the rate of ten per cent. per annum, and if this note is not paid at maturity we also agree to pay all reasonable attorneys' fees incurred in or attending the collection of the same, and that interest shall draw the same rate as principal.

THE FITZGERALD & MALLORY
CONSTRUCTION CO.,
By C. H. LAMB, *Auditor.*

Endorsed: First National Bank, tr. F. R. Crocker, cashier.

Plaintiff is now the owner and holder of said note, and there is now due to plaintiff thereon from the defendant the sum of $917.91, with interest from the 23rd day of November, 1888, at ten per cent. per annum, for which plaintiff prays judgment.

Fourteenth Cause of Action.

Complainant further complains of the said defendant for that since the 1st day of January, 1888, and prior thereto, complainant paid out large sums of money at the request of defendant for legal services and advice. He has also, at the request of said defendant and for its benefit, had to expend large sums of money and do a great deal of service since January, 1888, as well as to pay out large sums prior to that time, for which there has been no settlement, but which sums were paid out at request of defendant and for its benefit, which money paid for the said defendant and services rendered amount to the sum of $5,000, and there is now due for money paid out and for services rendered the said defendant at its instance and request and for its benefit the sum of $5,000.

Plaintiff therefore prays judgment for the sum of $51,271.85, with interest on $5,128.25 from the 1st day of November, A. D. 1888, at 10 per cent. per annum; with interest on $15,468.62 from the 25th day of September, A. D. 1888, at 10 per cent. per annum; with interest on $5,000 from the 1st day of May, A. D. 1886, at 7 per cent. per annum; with interest on $5,000 from the 1st day of May, A. D. 1887, at 7 per cent. per annum; with interest on $3,333.28 from the 1st day of January, A. D. 1888, at 7 per cent. per annum; with interest on $1,515 from the 10th day of June, A. D. 1886, at 7 per cent. per annum; with interest on $1,500 from the 7th day of May, A. D. 1887, at 7 per cent. per annum; with interest on $396.65 from the 1st day of January, A. D. 1887, at 7 per cent. annum; with interest on $227.50 from the 1st day of January, A. D. 1888, at 7 per cent. per annum; with interest on $1,928 from the 30th day of July, A. D. 1888, at 10 per cent. per annum; with interest on $5,000 from the 22d day of November, A. D. 1888, at 10 per cent. per annum; with interest on $917.91 from the 23rd day of November, A. D. 1888, at 10 per cent. per annum; with interest on $5,000 from the 1st day of December, A. D. 1888, at 7 per cent. per annum; with interest on $856.64 from the 16th day of January, A. D. 1888, at 7 per cent. per annum.

MARQUETT, DEWEESE & HALL,
Att'ys for Pl'ff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

John Fitzgerald, being first duly sworn, upon his oath says that he is the complainant in the above-entitled cause; that he has read the foregoing petition, knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

JOHN FITZGERALD.

Subscribed in my presence and sworn to before me by the said John Fitzgerald this 22nd day of December, A. D. 1888.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

The clerk will please issue summons endorsed, "Plaintiff prays judgment for $51,271.85, with interest from May 1st, A. D. 1886, at the rate of 10 per cent. per annum."

Endorsed on petition: In the district court of county of Lancaster. John Fitzgerald *vs.* The Fitzgerald & Mallory Con-
11½ struction Company. Petition. Clerk's office, district court. Filed Dec. 22, 1888. E. R. Sizer, clerk dist. court.

Affidavit of Amount Due.

In the District Court within and for the County of Lancaster, State of Nebraska.

JOHN FITZGERALD
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, a Corporation Duly Organized under the Laws of the State of Iowa.

STATE OF NEBRASKA, } ss:
Lancaster County, }

John Fitzgerald, being duly sworn, deposes and says that John Fitzgerald has commenced an action against the Fitzgerald & Mallory Construction Company in the district court of Lancaster county, State of Nebraska, to recover the sum of $51,271.85, with interest, now due and payable to the plaintiff from the defendant upon certain promissory notes and bills of exchange executed and delivered to divers persons by the defendant, and which the plaintiff has paid at the request of the said defendant, and by reason of plaintiff being endorser for said defendant, and which said notes have been assigned to plaintiff; also on account of work and labor and service performed by said plaintiff for said defendant at its request and as per agreement, and as a further cause of action against said defendant for money paid out and expended at the request and for the use and benefit of said defendant by the said plaintiff and paid while in the service and employ of said defendant.

Affiant further says that said claim is just, and that he, John Fitzgerald, ought, as he believes, to recover thereon the sum of
$51,271.85, with interest, and that the defendant, The Fitz-
12 gerald & Mallory Construction Co npany, is a foreign corporation.

JOHN FITZGERALD.

Subscribed in my presence and sworn to before me by the said Fitzgerald this 22nd day of December, A. D. 1888.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

Endorsed: In the district court, county of Lancaster. John Fitzgerald *vs.* The Fitzgerald & Mallory Construction Company. Affidavit of am't due. Clerk's office, district court. Filed Dec. 22, 1888. E. R. Sizer, clerk dist. court.

Affidavit in Garnishment.

In the District Court within and for the County of Lancaster, Nebraska.

JOHN FITZGERALD
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, a Corporation Duly Organized under the Laws of the State of Iowa.

STATE OF NEBRASKA, } ss:
County of Lancaster, }

John Fitzgerald, being duly sworn, deposes and says that he has good reason to believe and does believe that the Missouri Pacific Railway Company, a corporation organized under the laws of the States of Missouri, Kansas, and Nabraska, and a corporation doing business in all three of said States and doing business at Lincoln, Lancaster county, Nebraska, within said county of Lancaster, has property of the defendant in its possession, to wit, moneys and debts due defendant, and also that the said Missouri Pacific Railway Company is indebted to the defendant, The Fitzgerald & Mallory Construction Company, in an amount unknown to affiant—that is, affiant does not know the exact amount so due.

JOHN FITZGERALD.

13 Subscribed in my presence and sworn to before me by the said John Fitzgerald this 22nd day of December, A. D. 1888.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

Endorsed: In the district court of Lancaster Co., Neb. John Fitzgerald *vs.* The Fitzgerald & Mallory Construction Company. Affidavit in garnishment. Clerk's office, district court. Filed Dec. 22, 1888. E. R. Sizer, clerk, dist. court.

Summons.

STATE OF NEBRASKA, } ss:
Lancaster County, }

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify The Fitzgerald and Mallory Construction Company, defendant, that it has been sued by John Fitzgerald, plaintiff, in the district court of the second judicial district in and for said county of Lancaster, and that unless it answer by the 21st day of January, A. D. 1889, the petition of said John Fitzgerald, plaintiff, filed against it in the clerk's office of said court,

such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 31st day of December, A. D. 1888.

Witness my hand and seal of said court, at Lincoln, this 22nd day of December, A. D. 1888.

[SEAL.] E. R. SIZER, *Clerk*,
By A. H. HARRINGTON, *Deputy*.

Endorsed: Summons. District court, Lancaster county. No. 5879. Doc. S, page 249. John Fitzgerald, plaintiff, *vs.* The Fitzgerald & Mallory Construction Co., defendant.

If defendant fail to appear and answer the plaintiff will take judgment for $51,271.85, together with 10 per cent. interest thereon from May 1st, 1886, and costs of suit.

Attest: E. R. SIZER, *Clerk*,
By A. H. HARRINGTON, *Deputy*.

14 Returnable Dec. 31st, 1888.
MARQUETT, DEWEESE & HALL,
Plaintiff's Attorney.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that on the 24th day of December, 1888, I served the within writ of summons on the within named, The Fitzgerald and Mallory Construction Company, by delivering to Smith H. Mallory, the president and managing agent of said Fitzgerald and Mallory Construction Company, a true and certified copy of this summons with all the endorsements thereon, as required by law.

S. M. MELICK, *Sheriff*.

Fees—total, $0.85.

Clerk's office, district court. Filed Dec. 27, 1888. E. R. Sizer, clerk dist. court.

Order of Attachment.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

District Court of Lancaster County.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, a Corporation Duly Organized under the Laws of the State of Iowa, Defendants.

The State of Nebraska to the sheriff of said county, Greeting:

You are commanded to attach and safely keep the lands, tenements, goods, chattels, stocks or interest in stocks, rights, credits, moneys, and effects of the defendant, The Fitzgerald & Mallory Con-

struction Company, a corporation duly organized under the laws of the State of Iowa, not exempt by law from being applied to the payment of the claims of the plaintiff, John Fitzgerald, or so much thereof as will satisfy his claim for fifty-one thousand two
15 hundred and seventy-one & $\frac{85}{100}$ dollars ($51,271.85), with 10 per cent. interest from May 1st, 1886, and fifty ($50.00) —, the probable costs of this action.

You will make due return of this order on the 31st day of December, A. D. 1888.

Witness my hand and the seal of said court, at Lincoln, this 22nd day of December, A. D. 1888.

[SEAL.]

E. R. SIZER, *Clerk*,
By A. H. HARRINGTON,
Deputy Clerk.

Endorsed: Ex. doc. J, page 278. Order of attachment. District court, Lancaster county. Doc. S, No. 5879, page 249. John Fitzgerald, plaintiff, *vs.* The Fitzgerald & Mallory Construction Company, defendant. Amount sworn to, $51,271.85, and 10 per cent. int. from May 1st, 1886. Probable cost, $50.00. Marquett, Deweese and Hall, att'ys. Returnable Dec. 31st, 1888. E. R. Sizer, by A. H. Harrington, deputy.

Garnishee Summons.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

In the District Court of the Second Judical District within and for said County of Lancaster.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY, Defendant,

To the Missouri Pacific Railroad Company:

You are hereby notified to appear before said district court on or before December 31st, 1888, then and there to answer upon oath such questions as may be propounded to you touching the property of every description, whether goods, chattels, stocks, or interest in stocks, money, rights, credits, or effects, of the said defendant, The Fitzgerald and Mallory Construction Company, in your pos-
16 session or under your control, and this you will in nowise omit to do under the penalty of the law.

Given under my hand this 24th day of December, A. D. 1888.

S. M. MELICK, *Sheriff.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that I received this writ on the 24th day of De-

cember, 1888, at 9 o'clock a. m., and, not being able to come at the property of the Fitzgerald & Mallory Construction Company claimed to be in the possession of the Missouri Pacific Railway Company, I on the same day, at 10 o'clock a. m., served on the Missouri Pacific Railway Company, garnishee, by delivering to R. P. R. Miller, the general managing agent of the said Missouri Pacific Railway Company, a certified copy of this order, and also a written notice to appear on or before the 31st day of Dec., 1888, and answer as therein required, a copy of which notice is hereto attached; and also on said day I served a copy of said notice on S. H. Mallory, president of said Fitzgerald & Mallory Construction Company.

S. M. MELICK, *Sheriff*,
By A. C. LANGDON, *Deputy*.

Fees:

Service	75
Copy	50
Issuing garnishee	50
Serving "	50
Copy "	25
Fees of said garnishee	1 00
Copy of attach	50
Mileage	20
Total	$4 20

Clerk's office, district court. Filed Jan. 4, 1889. E. R. Sizer, clerk dist. court.

Demurrer.

In the District Court, Lancaster County, State of Nebraska.

17 JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant. } Demurrer.

Now comes the said defendant, The Fitzgerald and Mallory Construction Company, and demurs to the petition of the plaintiff filed herein, for the following reasons, to wit:

1. Because the same does not state facts sufficient to constitute any cause of action — the said defendant.
2. Because two or more pretended causes of action are improperly joined.
3. Because there is a defect of parties defendant.

M. T. FRAME,
Attorney for Defendant.

Endorsed: John Fitzgerald *vs.* The Fitzgerald & Mallory Construction Company. In district court for Lancaster county, Nebraska. Demurrer. Clerk's office, district court. Filed Jan. 19, 1889. E. R. Sizer, clerk dist. court.

Petition for Removal.

In the District Court, Lancaster County, State of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Petition of the Defendant to Remove This Cause to the United States Circuit Court.

To the honorable the district court of Lancaster county, State of Nebraska:

Your petitioner, The Fitzgerald & Mallory Construction Company, respectfully says that it is the defendant in the above-entitled
18 suit; that the matter in dispute therein exceeds, exclusive of interest and costs, the sum of two thousand ($2,000) dollars; that said suit is of a civil nature and instituted by the plaintiff to recover judgment of and from said defendant, your petitioner, for the sum of exceeding the sum of fifty-one thousand ($51,000) dollars.

Your petitioner further avers that the said action has not been tried, and by the rules of pleading the said defendant, your petitioner, is not required to answer the pleading and the petition of the plaintiff until the — day of January, A. D. 1889.

Your petitioner further avers that in said action there is a controversy between citizens of different States; that at the commencement of this action your petitioner, The Fitzgerald and Mallory Construction Company, was and still is a citizen of the State of Iowa, being a corporation duly chartered, created, organized, and existing under and by virtue of the laws of the State of Iowa, and at the commencement of this suit the said John Fitzgerald was and still is a citizen of the State of Nebraska.

Your petitioner offers herewith a bond with good and sufficient surety for its entering in said circuit court of the United States on the first day of its next session a copy of the record of this suit, and for paying all costs that may be awarded if said circuit court shall hold that this suit was wrongfully or improperly removed thereto; and it prays this court to proceed no further, except to make the order of removal and accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of Nebraska.

THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY,
By M. T. FRAME, *Its Attorney.*

STATE OF KANSAS, }
County of Atchison, } *ss:*

19 I, M. T. Frame, being duly sworn, depose and say: I am the duly authorized attorney of the defendant, The Fitzgerald and Mallory Construction Company, a corporation, the petitioner

herein; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

M. T. FRAME.

Sworn to and subscribed before me this 16th day of Jan'y, A. D. 1889.

[SEAL.] J. W. WAGGENER,
Notary Public.

My commission expires May 16, 1892.

Endorsed: John Fitzgerald *vs.* F. & M. C. Co. Petition for removal. Clerk's office, district court. Filed Jan. 19, 1889. E. R. Sizer, clerk dist. court.

Bond for Removal.

Know all men by these presents that the Fitzgerald & Mallory Construction Company, as principal, and C. T. Boggs, as sure*ties*, are held and firmly bound unto John Fitzgerald in the penal sum of one thousand dollars ($1,000); for the payment whereof, well and truly to be made, unto the said John Fitzgerald, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions:

The said Fitzgerald and Mallory Construction Company having petitioned the district court of Lancaster county, State of Nebraska, for the removal of a certain cause therein pending, wherein John Fitzgerald is plaintiff and The Fitzgerald & Mallory Construction Company is defendant, to the district court of the United States in and for the district of Nebraska:

Now, if the said Fitzgerald & Mallory Construction Company, your petitioner, shall enter in the said circuit court of the United States for the district of Nebraska, on the first day of its next session, a copy of the records in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 19th day of January, 1889.

FITZGERALD & MALLORY CONSTRUCTION COMPANY,
By M. T. FRAME, *Its Attorney-in-Fact.*
C. T. BOGGS.

STATE OF NEBRASKA, } ss:
County of Lancaster, }

I, C. T. Boggs, of said county, the surety named in the foregoing bond, being duly sworn, depose and say that I am a resident of the State of Nebraska and a property-holder therein; that I am worth the sum of two thousand ($2,000) dollars over and above all

my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Nebraska liable to execution of the value of more than two thousand ($2,000) dollars.

C. T. BOGGS.

Subscribed in my presence by C. T. Boggs and by him sworn to before me this 19th day of January, A. D. 1889.

[SEAL.] A. R. TALBOT,
Notary Public.

Endorsed: John Fitzgerald *vs.* F. & M. Con. Co. Bond for removal. Clerk's office, district court. Filed Jan. 19, 1889. E. R. Sizer, clerk dist. court.

Certificate.

THE STATE OF NEBRASKA, } ss.:
Lancaster County, }

I, E. R. Sizer, clerk of the district court, second judicial district of Nebraska, in and for said county, do hereby certify that the above and foregoing are true and correct copies of all papers filed,
21 with all of the endorsements on each, together with all proceedings had in our said court, in a cause therein wherein John Fitzgerald is plaintiff and The Fitzgerald and Mallory Construction Company is defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court, at Lincoln, this 24th day of January, A. D. 1889.

[SEAL.] E. R. SIZER, *Clerk D. C.*

Transcript fee, $7.50.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 340, M. John Fitzgerald *vs.* Fitzgerald & Mallory Const. Co. Transcript and —— for the —— court. Filed Feb. 2, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 15th day of May, 1889, motion to require garnishee to answer was filed in said case; which said motion is in words and figures following, to wit:

Motion.

In the Circuit Court of the United States, District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } The Missouri Pacific Railway Company, Garnishee.

Now comes the plaintiff in the above-entitled action and moves

the court to require the garnishee in this case, the Missouri Pacific Railway Company, to answer the following questions under oath, to wit, touching its indebtedness to the Fitzgerald and Mallory Construction Company:

Interrogatory 1. State if you have any property or effects of the Fitzgerald and Mallory Construction Company in your pos-
22 session or under your control.

Interrogatory 2. State if you are indebted to the said Fitzgerald and Mallory Construction Company; and, if so, how much.

Interrogatory 3. Did not the Missouri Pacific Railway Company and the said Fitzgerald and Mallory Construction Company at one time, for the purpose of arbitrating the amount due the construction company, appoint each an arbitrator, and was not the arbitrator appointed by the Missouri Pacific Railway Company S. H. H. Clark, first vice-president of said Missouri Pacific Railway Company, and the one appointed by the Fitzgerald and Mallory Construction Company D. J. Thayer?

Interrogatory 4. Did not said arbitrators run partially over the accounts of said companies, and was it not understood that after the Missouri Pacific Railway Company had brought its claim that as far as the said arbitrators went *that* it was agreed that there was due to the Fitzgerald and Mallory Construction Company from the Missouri Pacific Railway Company $361,976.12?

Interrogatory 5. State if there is not other indebtedness besides this reported upon by the two arbitrators which is due from the Missouri Pacific to the said construction company; and, if so, how much.

Interrogatory 6. Is not George J. Gould vice-president of the Missouri Pacific Railway Company and its principal manager, and is he not one of the directors of said company?

Interrogatory 7. And did not said George J. Gould commence a suit entitled George J. Gould, for himself and all other stockholders of the Fitzgerald and Mallory Construction Company, plaintiffs, against The Fitzgerald and Mallory Construction Company, admitting in said suit that the Missouri Pacific Railway Company was indebted in quite a sum to the Fitzgerald and Mallory Con-
23 struction Company? Plaintiff moves the court to require an early answer.

MARQUETT, DEWEESE & HALL,
Att'ys for Plaintiff.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 340, M. In the circuit court of the United States, district of Nebraska. John Fitzgerald, plaintiff, *vs.* The Fitzgerald and Mallory Construction Company, defendant. The Missouri Pacific Railway Company, garnishee. Motion to require garnishee to answer. Filed May 15, 1889. Elmer D. Frank, clerk. Marquett, Deweese & Hall, attorneys for plaintiff.

Thereupon, afterwards, to wit, at the May term of said court, on the 15th day of May, 1889, the following proceedings were had and

done in said cause, as appears of record on folio 451, Journal N of said court, to wit:

JOHN FITZGERALD
vs.
FITZGERALD & MALLORY CONSTRUCTION COMPANY. } 340, M.

On motion of the defendant, by Frame & Waggener, its attorneys, leave is hereby granted by the court to file answer by Thursday next, and plaintiff is ruled to reply by Monday next.

JOHN FITZGERALD
vs.
FITZGERALD & MALLORY CONSTRUCTION COMPANY. } 340, M.

On motion of the plaintiff, by Marquett, Deweese & Hall, his attorneys, it is ordered by the court that the garnishee file answer herein in eleven days from this date.

Thereupon, afterwards, to wit, on the 23rd day of May, 1889, answer of garnishee was filed in said case; which said answer
24 is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Answer of the Missouri Pacific Railway Company, Garnishee.

Now comes the Missouri Pacific Railway Company, garnishee in the above-entitled action, and shows to the court that it has been garnisheed herein as a debtor of said defendant, The Fitzgerald & Mallory Construction Company, and, being required to answer, states:

1. That it is impossible at this time for it to make a definite answer, as there are numerous suits pending against the said Missouri Pacific Railway Company for accounting growing out of the transactions between it and the said Fitzgerald & Mallory Construction Company, and it cannot state definitely or otherwise whether on such an accounting there will be due to the Fitzgerald & Mallory Construction Company any sum or sums of money whatsoever, or whether said construction company will be indebted to said Missouri Pacific Railway Company.

2. Further answering, it states that it entered into a contract with the Fitzgerald & Mallory Construction Company of date May 6th, A. D. 1886, to purchase from it certain securities and stock of the Denver, Memphis & Atlantic Railway Company upon written conditions named and expressed in said contract, and that growing out of said contract litigation has resulted in which the Missouri Pacific Railway Company has been sued; and it claims that it is not

indebted to said Fitzgerald and Mallory Construction Company in any sum whatever, and that a proper accounting between
25 the Fitzgerald and Mallory Construction Company and the Missouri Pacific Railway Company will show that the said Fitzgerald & Mallory Construction Company is indebted to said Missouri Pacific Railway Company, and it cannot until such litigation is ended make more definite answer as garnishee herein.

B. P. WAGGENER,
General Attorney, Mo. Pac. R'y Co.

STATE OF KANSAS, }
County of Atchison, } *ss:*

B. P. Waggener, being first duly sworn, deposes and says that he is the duly authorized general attorney of said The Missouri Pacific Railway Company, garnishee, and as such is familiar with the accounts and transactions between it and the Fitzgerald & Mallory Construction Company; that he has read and knows the contents of the within and foregoing answer of said company as garnishee, and that the matters and things therein stated are true.

B. P. WAGGENER.

Subscribed and sworn to before me this 21st day of May, A. D. 1889.

J. W. WAGGENER, [SEAL.]
Notary Public.

My commission expires May 16th, 1892.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 340, M. U. S. circuit court, district of Nebraska. John Fitzgerald *vs.* The Fitzgerald and Mallory Construction Company. Answer of Missouri Pacific R'y Co., as garnishee. Filed May 23, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the said May term of said court, on the 11th day of May, 1889, the following proceedings were had and done in said cause, as appears of record on folio 524, Journal "N" of said court, to wit:

JOHN FITZGERALD
vs. } 340, M.
26 FITZGERALD & MALLORY CONSTRUCTION COMPANY.

Now come the parties hereto, by their attorneys, and by agreement in open court this cause is hereby set down for trial on Tuesday next, the same to be tried before six special jurors, the plaintiff agreeing to advance the jury fees to pay said jurors.

Thereupon, afterwards, to wit, at the said May term of said court, on the 18th day of June, 1889, the following proceedings were had and done, as appears of record on folio 548, Journal "N" of said court, to wit:

JOHN FITZGERALD
vs.
FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } 340, M.

On motion of the defendant, by Waggener & Frame, its attorneys, it is ordered by the court that said defendant have leave to amend its answer herein by to-morrow morning.

Thereupon, afterwards, to wit, on the 19th day of June, 1889, an amended answer was filed in said case; which said amended answer is in words and figures following, to wit:

Amended Answer.

In the Circuit Court of the United States for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendants.

Now comes The Fitzgerald & Mallory Construction Company, defendant, and for its amended answer to the plaintiff's petition says:

1st. That it denies each and every allegation in the plaintiff's petition contained, excepting those herein specifically admitted.

27 2nd. That for further answer to the cause of action set out in the first count of said petition the defendant admits that it is a corporation duly organized under the laws of the State of Iowa and doing business in the States of Iowa and Kansas, but denies that S. H. Mallory, as president of this defendant company, has any authority whatever to make and execute the promissory note in writing for five thousand and two dollars and eighty cents, dated at Lincoln, Nebraska, July 31st, 1888, and payable to the order of the First National Bank of Lincoln, Nebraske, as in said first count alleged, for the reason that article five of the articles of incorporation, under which this defendant company derived its legal existence, prohibited the president from executing the notes of the defendant company for the purpose of borrowing money, which said article is in the following words: "The directors shall fill vacancies in their own numbers as may be by by-law prescribed; they shall manage the business of the corporation; they shall have power to sell, lease, or mortgage all their property and land acquired by said corporation, to issue the bonds of the same, signed by the proper officers thereof, for the purpose of raising money to carry on the business of the corporation, and to secure the same by mortgage upon the real estate, building, machinery, and other property of the company.

They shall also appoint a president and vice-president from their own number, a secretary and treasurer, who may or may not be directors, and such other officers as may be deemed necessary.

They shall also keep a record book of all their proceedings, which shall be opened to the inspection of the stockholders, as shall also be the stock books and records of the corporation."

And for the further reason that the president is prohibited by article eight of the said articles of incorporation from making
28 any contract binding the corporation, said article eight being in the following words:

"All certificates of stock, contracts, and bonds shall be signed by the president and secretary."

And defendant avers that there was no authority for the execution of said promissory note for the purpose of raising money to carry on the business of this defendant company or for any other purpose whatever.

That said defendant, John Fitzgerald, had no authority to, nor did he, at the instance and request of the defendant, endorse said note; that said promissory note was not made and executed by the president and secretary of this defendant company; and defendant denies that on the 31st day of July, 1888, it made and executed its certain promissory note in writing of that date and delivered the same to the First National Bank of Lincoln, Nebraska.

Defendant alleges, however, that said John Fitzgerald was a stockholder of this defendant corporation, and had full notice of the powers and limitation of powers conferred and prescribed by said articles five and eight of said articles of incorporation, under which this defendant existed and acted, and said John Fitzgerald well knew the want of authority in S. H. Mallory as president to make and execute said note and bind this defendant thereby, and of all of which plaintiff had notice at the time he pretends to have endorsed said note and at the time said John R. Clark, cashier, endorsed the same to plaintiff.

The defendant further says that said note was not executed in the usual course of the business of said defendant company, nor did said defendant company receive any benefit therefrom or any part of the consideration thereof, but that the same was signed by said S. H. Mallory at the instance and request of John Fitzgerald,
29 they acting together and in concert with each other, as this defendant believes and so charges the fact to be, to defraud the said defendant company and to take the advantage, as far as might be, of their position as officers of said company, for the purpose of obtaining and securing an individual, personal judgment, and not for the purpose of promoting the interest of said defendant company; that the said defendant company did not request the said John Fitzgerald to endorse said note, and he was not authorized to endorse the same by said defendant company, and if he did endorse the same he was a mere volunteer, and it was not necessary that the same should be endorsed, so far as this defendant company was concerned, all of which was well known to said complainant.

Wherefore defendant prays that said first cause of action in said plaintiff's petition be dismissed.

3rd. That for answer to the cause of action set out in the plaintiff's second cause in his petition defendant says that S. H. Mallory, as the president of this defendant company, had no authority whatever to make and execute the promissory note in writing for $15,290.24, dated at New York July 25th, 1888, payable to J. J. P.

Odell, cashier, as in said count alleged, nor did the said John Fitzgerald, at the instance and request of this defendant, endorse said note.

Defendant avers that by reason of the powers and limitations of powers conferred and prescribed by the articles of incorporation—viz., five and eight—heretofore fully set out in the second defense of this answer, and here now referred to, the contracts and obligations of this defendant company could only be made and executed by the duly elected and qualified president and secretary thereof; that the plaintiff, John Fitzgerald, being a stockholder of said corporation at the time, had full knowledge of the want of authority in S. H. Mallory, as president, to make and execute said promissory note at the time he endorsed the same and at the time the said note was assigned and transferred to him.

Defendant denies that on the 25th day of July, A. D. 1888, it made and executed said note of that date, and delivered the same to J. J. P. Odell, cashier, as in said petition alleged, and denies that it received any benefit therefrom or any part of the consideration thereof, of which the said plaintiff had notice.

Wherefore defendant prays that said second cause of action in plaintiff's petition be dismissed.

4th. That for answer to the third cause of action set forth in plaintiff's petition defendant denies that on or about the 1st day of May, A. D. 1885, it employed plaintiff for the purpose of making a contract with the Denver, Memphis and Atlantic Railway Company and looking after the construction of said railroads from Bell Plain to Kingman at an agreed salary of $5,000.00 per year.

Defendant alleges and charges the fact to be that at said time this defendant was not incorporated and had no legal existence or otherwise, and was not incorporated or organized as a corporation until in the year 1886.

And defendant denies that it ever at any time agreed to pay plaintiff the sum of $5,000.00 for his services, commencing on the first day of May, A. D. 1886, and ending on the 1st day of May, A. D. 1886, as in said third count of plaintiff's petition alleged.

This defendant avers that on or about the 4th day of February, A. D. 1887, the said John Fitzgerald presented an account against this defendant company for moneys advanced and materials furnished, which included all indebtedness of every kind and nature up to that date; and this defendant company paid said John Fitzgerald said amount, which aggregated $62,889.22, by giving credit on his stock subscription for the amount thereof.

And said plaintiff did not perform any services for said defendant company between the 1st day of May, 1885, and the 1st day of May, 1886.

Wherefore the defendant prays that said third cause of action in plaintiff's petition be dismissed.

5th. For answer to the fourth count in plaintiff's petition defendant says that it denies that plaintiff was employed by defendant as general manager on the contract with the Denver, Memphis and Atlantic Railway Company on the agreed salary of $5,000.00 a year,

beginning on the first day of May, A. D. 1886, and ending on the 1st day of May, A. D. 1887; but defendant admits that the plaintiff was employed as the general manager as aforesaid for a portion of the year 1886, to wit, from the 4th day of November, 1886, at a salary of $5,000.00 per annum, being the date and amount fixed and determined upon by the board of directors of the Fitzgerald and Mallory Construction Company, passed on said 4th day of November, A. D. 1886, which resolution is in the following words:

"On motion of Mr. Cross, the salaries of the general manager and the president of the Construction Company were fixed at $5,000.00 and $7,500 per year, respectively."

But prior to said date there had — no such position or office as general manager created by the charter or by-laws of said defendant company or by any action of the board of directors or by any person by them authorized.

Wherefore defendant prays that said fourth cause of action of plaintiff's petition be dismissed.

6th. That for answer to the fifth count in the plaintiff's petition defendant admits that the plaintiff was in the employment of the Fitzgerald and Mallory Construction Company at a salary of $5,000.00 per annum, and, as applicable to the 3rd, fourth, and 5th
32 counts in plaintiff's petition, that the plaintiff was employed as the general manager of the Fitzgerald and Mallory Construction Company, at a salary of $5,000.00 per annum, from the 4th day of November, A. D. 1886 (being the date when the salary of the general manager was fixed by resolution of the board of directors of said Fitzgerald and Mallory Construction Company, and which resolution is set out in the 5th defense in this answer and now here referred to) to the 1st day of January, A. D. 1888, being one year and two months; but as a part of said employment it was agreed and understood that said plaintiff was to devote his time and attention to the business of said company committed thereby to his care and to the promotion of the interests of said company, but instead thereof the said plaintiff, as this defendant is informed and believes and charges the fact to be, did not devote his time and attention to the business and interest committed to his care, but neglected the same to such an extent as to cause this defendant great and irreparable injury and damage, in all of which acts of neglect the plaintiff was wilful, and he rendered no consideration whatever for the said salary, and the said defendant was greatly damaged by reason of his inattention to business and his failure to discharge the duties of his said employment, and by reason of his exceeding his authority as such general manager of said company; that by reason of the failure of said plaintiff to give proper attention to said business this defendant has sustained great and irreparable loss and has been compelled to pay out and become liable for and assume obligations to an amount exceeding $25,000.00, all of which would have been obviated had the said John Fitzgerald given that time and attention to the prosecution of the business especially committed to his care that in good faith he should have given for the salary which has been allowed to him as such general manager.

Wherefore defendant prays that said fifth cause of action in plaintiff's petition be dismissed.

7th. That for answer to the sixth cause of action in the plaintiff's petition set out defendant alleges that it has no knowledge of the facts and allegations therein contained sufficient to form a belief, and therefore denies that the plaintiff sold and delivered to this defendant the goods and chattels in said sixth count enumerated, amounting to the aggregate value of $1,515.00, and defendant denies that it ever agreed to give the price of $1,515.00 for said goods and chattels, and that there is due from the said defendant to the plaintiff the sum of $1,515, or any part thereof, but alleges the fact to be that when said account was presented, on the 4th day of February, 1887, it was represented and claimed by the said plaintiff to include items of every kind and nature due to him up to said date.

Wherefore the defendant prays that the sixth cause of action in plaintiff's petition be dismissed.

8th. That for answer to the seventh cause of action in plaintiff's petition set out defendant alleges that it has no knowledge of the facts and allegations therein contained sufficient to form a belief, and therefore defendant denies each averment and statement thereof, but alleges and charges the fact to be that said plaintiff did not deliver to said defendant the said track-laying tram, and the same was not received by said defendant, and that if the same was shipped to the said defendant by the said plaintiff it was done in violation and without authority; that at said time he was a director in said company and acting as general manager, and if he undertook to sell said track-laying tram to said defendant company, as is alleged, said act of said plaintiff was for the purpose of taking the advantage of his position and relation as a director and manager to dispose of some worthless article in his possession, which had no other value than such as he might extort from said defendant in such pretended sale and transfer to it.

Wherefore defendant prays that said seventh cause of action in plaintiff's petition be dismissed.

9th. That for answer to the 10th cause of action in plaintiff's petition set out defendant denies that C. H. Lamb, as auditor, had any authority whatever to make the sight draft dated St. Louis, Missouri, April 28th, 1888, for $5,500.00, as in said 10th cause of action alleged; that said draft was drawn, as it appears, payable to the order of S. H. Mallory for $5,500.00, and was accepted by S. H. Mallory, and, as this defendant believes and charges the fact to be, $2,750.00 thereof was paid to and received by this plaintiff, John Fitzgerald, and $2,750.00 thereof was paid to and received by S. H. Mallory, and said S. H. Mallory and John Fitzgerald acted in *consent* with each another, dividing the proceeds of said draft, to wit, the sum of $5,500, they well knowing at the time that said C. M. Lamb, as such auditor, had no right, power, or authority to draw the same, and that said S. H. Mallory, as such president and plaintiff, then well knew that the same was not drawn for any benefit to or for said defendant company.

Defendant denies that it ever made said draft set out in said tenth

cause of action in the plaintiff's petition or authorized the same to be made, or that it received any consideration therefor.

Wherefore defendant prays that said tenth cause of action in said plaintiff's petition be dismissed.

10th. That for answer to the eleventh cause of action set out in plaintiff's petition defendant denies that on the 30th day of July, A. D. 1888, it made its certain promissory note in writing of that date for $5,000.00 due on demand, and delivered the same to the First National Bank of Chariton, Iowa, and denies that the same was made or executed by any person having any authority
35 to execute the same, and denies that said C. H. Lamb, as such auditor, has any such authority to make the same, and, as this defendant is informed and believes and so charges the fact to be, that said S. H. Mallory is interested as a stockholder and director in said First National Bank of Chariton, Iowa, to which said note was made payable; that this defendant did not receive any benefit from the proceeds thereof, and the same was not authorized to be drawn by the board of directors or any person by them thereunto duly authorized; and this defendant further says that it is informed and believes and so charges the fact to be that said S. H. Mallory, being interested in said bank, caused said note to be transferred to said plaintiff solely for the purpose of bringing a suit thereon against this defendant, the said plaintiff in the suit well knowing that the said defendant received no benefit therefrom or no part of the consideration thereof.

Wherefore defendant prays that the eleventh cause of action in plaintiff's petition be dismissed.

11th. Defendant further says that it denied that said S. H. Mallory, as such president of said defendant company, had any general or special authority to execute any of the instruments of writing sued on herein, of which fact the said plaintiff had notice.

That said plaintiff was one of the original incorporators of the said defendant company, and has been a stockholder in said company since its organization and prior to the 17th day of April, 1889, had been a director of said defendant company and had notice of the charter, by-laws, and records of the proceedings of the stockholders and directors of said company, and said plaintiff then well knew that said S. H. Mallory had no general or special authority
36 to execute any of said contracts of writing or to procure the said plaintiffs to endorse the same, and any endorsements thereon by said plaintiff was not done for the purpose of aiding or assisting the defendant company, but for the purpose of annoying and harassing it.

The defendant especially denies, upon information and belief, that said John Fitzgerald ever advanced any money to or on account of or for the use and benefit of this defendant company, or that he had any right, power, or authority so to do, or that said defendant received any benefit whatever from any advances made said John Fitzgerald, and especially denies that said defendant ever requested said John Fitzgerald to become endorser on any promissory note, draft, bill of exchange, or other written obligation executed or

caused to be executed by the said defendant or by any one generally or specially authorized.

11. Defendant further says that the district court of Lancaster county, State of Nebraska, never had or acquired any jurisdiction of this defendant, and this court has no jurisdiction to hear, try, and determine the matters and things in controversy herein.

Wherefore this defendant prays judgment that the said several causes of action of the said plaintiff may be dismissed, and that it may have judgment against the said plaintiff for costs of suit.

M. T. FRAME, *P. D.*

STATE OF NEBRASKA, }
County of Douglas, } *ss:*

M. T. Frame, being first duly sworn, deposes and says that he is the duly authorized attorney for the defendant, The Fitzgerald and Mallory Construction Company, which defendant is a corporation and a non-resident of the State of Nebraska, and the president of said company is absent therefrom; that he has read the foregoing amended answer and knows the contents thereof, and the facts therein set forth are true, as he verily believes.

M. T. FRAME.

37 Subscribed in my presence and sworn to before me this 19th day of June, 1889.

ELMER D. FRANK, *Clerk.*

Upon the back of said amended answer appear endorsements in words and figures following, to wit: No. 340 M. In circuit court of United States, district of Nebraska. John Fitzgerald, plaintiff, *vs.* The Fitzgerald & Mallory Construction Company, defendant. Amended answer. Filed Jun- 19, 1889. Elmer D. Frank, clerk. ——— ———, attorneys for defendant.

Thereupon, afterwards, to wit, on the said 19th day of June, 1889, reply to amended answer was filed in said case; which said reply is in words and figures following, to wit:

Reply to Amended Answer.

In the Circuit Court of the United States in and for the District of Nebraska.

JOHN FITZGERALD, Plaintiff, }
vs. }
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendants. }

Now comes the said plaintiff, John Fitzgerald, and for reply to the amended answer of defendant says—

1st. That he denies each and every allegation in the defendant's answer contained except those herein specifically admitted.

2nd. He admits that article five of the incorporation reads as set

forth in said answer; also admits that article eight reads as set forth in said answer, but denies that said articles prohibited the making of the said promissory notes by said construction company, as set forth in plaintiff's petition.

For reply to the third cause of action set forth in the answer plaintiff alleges the fact to be that it was incorporated about
38 the middle of April, 1886, and alleges that prior to its organization of said defendant corporation and when the same was in view by its promoters John Fitzgerald and S. H. Mallory and others, in view of organizing such construction company, took contracts to build a railroad across the State of Kansas, and that they commenced in the spring of 1885 and graded some 60 miles of said railroad, and that said Fitzgerald was manager and saw to the grading of the same and performed just such duties as he did after the incorporation. He was afterwards employed at the rate of $5,000.00 per annum, and the said work was well worth $5,000.00 per annum, and that it was done in view of an organization of said construction company, and that when said construction company was organized, in April, 1886, he still kept on working for the said construction company as he had worked before, and that when said construction company was organized it took all the assets of all kinds and paid for the 60 miles of grading done as aforesaid, and it assumed all the liabilities of the promoters, and, among other things, assumed and afterwards passed a resolution agreeing to give plaintiff for his services $5,000.00 per year.

Defendant submits, under advice of counsel, that said corporation, having taken all the property of the promotors, getting the benefit of the grading and pay for it, that it assumed the liabilities, among others, to pay plaintiff for the work he did.

Plaintiff therefore prays judgment for all of the amounts as set forth in his petition.

MARQUETT, DEWEESE & HALL,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Nebraska, County of Douglas, } *ss:*

John Fitzgerald, plaintiff, being first duly sworn, states that he is the plaintiff in the above-entitled cause, and that the matters
39 and things set forth in the foregoing reply are true, as he believes.

JOHN FITZGERALD.

Subscribed in my presence and sworn to before me this 19th day of June, A. D. 1889.

ELMER D. FRANK, *Clerk.*

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 340 M. In circuit court of the United States, district of Nebraska. John Fitzgerald, plaintiff, *vs.* The Fitzgerald & Mallory Construction Company, defendants. Reply to amended answer. Filed Jun- 19, 1889. Elmer D. Frank, clerk. Marquett, Deweese & Hall, attorneys for plaintiff.

Trial to Jury.

Thereupon, afterwards, to wit, at the May term of said court, on the 20th day of June, 1889, the following proceedings were had and done in said cause, as appears of record on folio 553, Journal "N" of said court, to wit:

JOHN FITZGERALD
vs.
FITZGERALD & MALLORY CONSTRUCTION COMPANY. } Trial. No. 340 M.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, W. S. McGowan; 2, John Manning; 3, Peter Warner; 4, John Becker; 5, John L. Stephens; 6, John Culp; 7, A. R. Goolsby; 8, Barrott Scott; 9, Joseph Warren; 10, Wm. Lehmer; 11, J. S. Edwards; 12, Walt M. Seeley, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence in part, and the time having arrived for the adjournment of the court, and the trial of this cause not being finished, the same was continued until ten o'clock to-morrow morning.

40 Thereupon, afterwards, to wit, at the said May term of said court, on the 21st day of June, 1889, the following proceedings were had and done in said cause, as appears of record on folio 555, Journal "N" of said court.

JOHN FITZGERALD
vs.
FITZGERALD & MALLORY CONSTRUCTION COMPANY. } Trial Continued. No. 340 M.

On this day again come the parties hereto, by their attorneys; also comes the jury empaneled and sworn herein. Said jury heard further testimony; and the time having arrived for the adjournment of the court and the trial of this cause not being finished, said jury was allowed to separate until the coming in of court to-morrow morning.

Thereupon, afterwards, to wit, on the 22nd day of June, 1889, plea to the jurisdiction of the court was filed in said case; which said plea is in words and figures following, to wit:

Plea to the Jurisdiction of the Court.

In the Circuit Court of the United States for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Now comes said defendant and presents this its plea to the jurisdiction of the court and says—

That it is a corporation organized under the laws of the State of

Iowa, but has never, previous to this date, transacted any business in this State of Nebraska or had any office in this State.

41 That on and previous to the 22nd day of December, A. D. 1888, the plaintiff had caused to be prepared his petition in this action, and, there being no officer or other person in the State of Nebraska upon whom service of summons could be made, the said John Fitzgerald, for the sole purpose of getting service on the defendant through a fraud, trick, and device, sent a telegram to S. H. Mallory, president of this defendant company, at Chariton, Iowa, his place of residence, in substance that he should come to Lincoln, Nebraska, without disclosing for what said plaintiff desired his, Mallory's, presence in said city of Lincoln; that said message was sent solely for the purpose of inducing said Mallory to go to Lincoln, Neb., in order that said plaintiff might get service on him as president of this defendant company, and that as soon as said Mallory got into the jurisdiction of the court summons was served on him in this action; that said plaintiff and said S. H. Mallory concealed from said defendant the circumstances under which said service was made, and defendant did not discover the facts until on this 21st day of June, 1889, after the trial of this case had commenced, and had no means of discovering the facts prior to that time.

And this defendant says that the service of the summons in this case was obtained by fraud and by a trick practiced by said plaintiff, and said Mallory, acting in concert with plaintiff, concealed said facts, so that this defendant did not obtain such information until this 21st day of June, A. D. 1889.

That by said act of the plaintiff he sought to invest the district court of Lancaster county, Nebraska, with jurisdiction of this defendant, and did not otherwise obtain service upon said defendant except through said trick, fraud, and device so practiced as aforesaid; that when said defendant filed demurrer to plaintiff's petition in the district court of Lancaster county, Neb., and

42 its petition for removal to this court and when it filed its answer and amended answer herein it did not know and had no means of knowing the fraud that had been practiced upon it by said plaintiff; that said Mallory resides in Chariton, Iowa, and went to Lincoln, Neb., in obedience to said telegram of John Fitzgerald, and would not have gone but for the same, and thereafter, acting in concert with said plaintiff, concealed said facts from this defendant.

Wherefore defendant prays that all further proceedings herein shall be stayed and this action be dismissed for want of jurisdiction.

M. T. FRAME,
Att'y for Def't.

THE COUNTY of DOUGLAS, } ss:
District of Nebraska, }

M. T. Frame, being duly sworn, says that he is the attorney of said defendant, and has read the within and foregoing petition and

plea to the jurisdiction, and the matter and things therein stated are true.

M. T. FRAME.

Subscribed and sworn to before me this 21st day of June, A. D. 1889.

ELMER D. FRANK, *Clerk.*

Upon the back of said plea appear endorsements in words and figures following, to wit: No. 340 M. John Fitzgerald *vs.* The Fitzgerald & Mallory Construction Company. Plea to the jurisdiction of the court. Filed Jun- 22, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 22d day of June, 1889, motion was filed in said case; which said motion is in words and figures following, to wit:

Motion for Nonsuit.

In the Circuit Court of the United States for the District of Nebraska.

43 JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Defendant moves the court for a nonsuit herein for the following reasons, to wit:

First. Because this court has no jurisdiction of the defendant or of this action.

Second. Because it appears from the petition that the defendant is a foreign corporation and was improperly sued in Lancaster county, Nebraska.

Third. Because the said district court of Lancaster county, Nebraska, had no right, power, or authority to take jurisdiction of this action or of this defendant.

Fourth. Because it does not appear from the pleadings and evidence that this action has been brought in compliance with sec. 59 of the Code of Civil Procedure.

Fifth. Because in and by said sec. 59 of the code of the district court of Lancaster county, Neb., *and* this court had and has no jurisdiction of this action or of this defendant.

Sixth. Because it does not appear from the pleadings and evidence that said action was properly instituted in any court in the State of Nebraska.

That the district court of Lancaster county, Nebraska, ever acquired any jurisdiction of said defendant, or that this court has any jurisdiction of this defendant.

M. T. FRAME,
B. P. WAGGENER,
Att'ys for Def't.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 340 M. John Fitzgerald *vs.* The F. & M. Con. Co. Motion for nonsuit. Filed June 22, 1889. Elmer D. Frank, clerk.

44 Thereupon, afterwards, to wit, at the May term of said court, on the said 22nd day of June, 1889, the following proceedings were had and done in said cause, as appears of record on folio 561, Journal "N," of said court, to wit:

JOHN FITZGERALD *vs.* FITZGERALD & MALLORY CONSTRUCTION COMPANY. } Trial Continued.

On this day again come the parties hereto, by their attorneys; also comes the jury empaneled and sworn herein. Said jury heard further testimony; and the time having arrived for the adjournment of the court and the trial of this cause not being finished, said jury was allowed to separate until the coming in of court on Monday morning.

JOHN FITZGERALD *vs.* FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } Motions to Dismiss Suit & for Nonsuit Overruled.

This cause having been heard on the motion of the defendant to dismiss the same and motion for nonsuit herein, and the court being fully advised in the premises, it is now, on this day, ordered and adjudged by the court that said motion to dismiss this action and motion for nonsuit be, and are hereby, overruled; to which ruling and order of the court said defendant, by its attorneys, then and there duly excepted.

Thereupon, afterwards, to wit, on the 24th day of June, 1889, motion to dismiss was filed in said case; which said motion is in words and figures following, to wit:

Motion to Dismiss.

In the Circuit Court of the United States for the District of Nebraska.

45 JOHN FITZGERALD, Plaintiff, *vs.* THE FITZGERALD & MALLORY CONSTRUCTION CO., Defendant.

Now comes said defendant and moves the court to dismiss this action for the following reasons, to wit:

First. Because the said plaintiff used the process of the court for the purpose of fraudulently obtaining service on the defendant.

Second. That it appears from the evidence that the said plaintiff enticed the president of the defendant company into the State of

Nebraska for the purpose of getting service on the defendant company, a foreign corporation, and that such trick and fraud was concealed from the defendant by said plaintiff and said S. H. Mallory until during the trial of this case.

Third. Because it appears from the evidence that the answer filed herein was filed by the defendant in ignorance of such fraud and trick of the said plaintiff.

Fourth. That said defendant would not have filed answer herein had it been advised of such trick and fraud, and that at the time said summons was served the said S. H. Mallory, president, was not in the State of Nebraska on any business for defendant company.

Fifth. Because it appears from the evidence that defendant is a foreign corporation and has not transacted any business in this State, and at the time suit was brought and summons served on S. H. Mallory defendant had no general managing agent and no managing agent in this State, and had no office or place of business.

Sixth. Because this action was improperly brought in the State of Nebraska, and service of summons was a trick, fraud, and deception to obtain jurisdiction of the defendant.

M. T. FRAME,
B. P. WAGGENER,
Att'ys for Def't.

46 Upon the back of said motion appear endorsements in words and figures following, to wit: No. 340, M. John Fitzgerald *vs.* F. & M. Const. Co. Motion to dismiss. Filed June 24, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, in the said May term of said court, on the 24th day of June, 1889, the following proceedings were had and done in said cause, as appears of record on folio 563 of said court, to wit:

JOHN FITZGERALD *vs.* FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } Leave to Withdraw Third Count of Petition. No. 340, M.

On motion of the plaintiff, by T. M. Marquett, his attorney, leave is hereby granted by the court to withdraw the claim stated in the third count in the petition herein.

JOHN FITZGERALD *vs.* FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } Motion to Dismiss Suit Overruled. No. 340, M.

This cause having been argued and submitted to the court on the motion of defendant to dismiss the same, and the court, being fully advised in the premises, and after careful consideration thereof, doth now, on this day, order and adjudge that said motion be, and the same is hereby, overruled; to which ruling and order of the court said defendant duly excepted.

Cause Submitted to Jury.

JOHN FITZGERALD
vs.
FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } 340, M.

47 On this day again come the parties hereto, by their attorneys; also comes the jury empaneled and sworn herein. Said jury, after having heard the remaining evidence, the argument of counsel, and charge of the court, retire to their room, under the charge of a bailiff duly sworn, for deliberation.

Thereupon, afterwards, to wit, on the 24th day of June, 1889, bill of exceptions were filed in said case; which said bill of exceptions are in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States in and for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant. } 340, M.

Be it remembered that on the trial of this case it was admitted by the plaintiff and defendant that the said defendant was a corporation organized and incorporated under and by virtue of the laws of the State of Iowa, and that its principal place of business was at Chariton, in the State of Iowa, and that S. H. Mallory was president of said company and since its organization down to the present time resided in the State of Iowa, and that said defendant company has never had any office or place of business in the State of Nebraska, and had no officer or managing agent in the State of Nebraska at the time this suit was instituted, to wit, on the 22nd day of December, 1888, and had no assets or property of any kind or nature in the State of Nebraska, and had never transacted any business in said State; and on the trial of said case S. H. Mallory was produced as a witness on behalf of the plaintiff, and among other things testified as follows:

48 (By Mr. WAGGENER:)

Q. Did you not know this suit was to be brought before it was brought?
A. No, sir.
Q. Did you not advise its being commenced?
A. No, sir.
Q. Was you not at Lincoln when it was brought?
A. Yes, sir; I was there.

Q. Your home is at Chariton, Iowa?
A. Yes, sir.
Q. And the service was made on you at Lincoln?
A. Yes, sir.
Q. Did you go there for that purpose?
A. No, sir.
Q. Did you not know that suit was to be brought when it was brought and when you went to Lincoln?
A. No, sir; I did not know it was. Mr. Fitzgerald telegraphed me to go and I went there.
Q. Did you not go to the office of Mr. Fitzgerald and consult with them at the time they were getting up these papers to commence this action?
A. I consulted with them in regard to it.
Q. Was you not in Mr. Marquett's office assisting and advising with him in getting up this suit?
A. I was in his office then.
Q. And for that purpose?
A. No, sir.

And the plaintiff, JOHN FITZGERALD, was also a witness on the trial of said case, and among other things testified as follows:

John Fitzgerald.

Q. You say you reside at Lincoln, Nebraska?
A. Yes, sir.
Q. Mr. Mallory resides at Chariton, Iowa?
A. Yes, sir.
Q. And has for a number of years?
A. Yes, sir.
Q. The construction company has had no business in the State of Nebraska, I believe—done no work in this State?
A. No; not the Fitzgerald & Mallory Company?
49 Q. That is, I mean the construction company?
A. No, sir.
Q. And has no office in this State?
A. No; not that I know of.
Q. And, so far as you know of, no property in this State?
A. No, sir.
Q. At the time that you brought this suit did Mr. Mallory come over to assist you and counsel with you about this?
A. No, sir. I told Mr. Mallory. He opposed the suit from first to last, and when I was in New York I told the directors that I was going to bring a suit unless they settled the matter.
Q. Did Mr. Mallory come over and consult with you about bringing that suit?
A. No; not until after I had the suit brought, when I telegraphed for him to come on business—I wanted to see him.
Q. Why, to commence a suit in order to get service on him, he did not know what you were going to do?
A. No, sir.

Q. You resorted to this trick to get him over there?
A. I resorted to this to get him over there. I had other business also.
Q. As soon as he came over you had him served?
A. Yes, sir.
Q. He did not come over voluntarily?
A. No, sir.
Q. Is it not a fact that he came voluntarily?
A. No, sir.
Q. He came over in obedience to that message?
A. Yes, sir.
Q. You had your paper ready?
A. Yes, sir.
Q. As soon as he landed you sued?
A. As soon as he landed the papers were served on him.
Q. The telegram was sent for the express purpose of getting him over?
A. I telegraphed him that I wanted to see him on business.
Q. And that was the business?
50 A. Yes, sir; but I had other business.
Q. And that is the way you got the service?
A. Yes, sir.
Q. Are you intending to say that the sole object you had in getting Mr. Mallory over there was to serve notice on him; was not there other business?

Objected to as leading.

A. There was some other business, of course, but I had been trying to get a settlement out of those people for two years and could not get a settlement out of them. I had some other business with Mr. Mallory besides and I telegraphed him to come over and he came over. Mr. Mallory opposed the suit from first to last because they were promising from day to day that they would make settlement and we went to New York several times——
Q. Is it not a fact that he was coming over most every week or you going over there?

Objected to as leading.

Q. State in reference to that matter.
A. He had come over several times and he and I had been in other business; probably he did not come over weekly, but he came several times before and after that.

Recross-examination by Mr. WAGGENER:

Q. How many telegrams did you send him at that time?
A. I think only one.
Q. Did you send him one telegram and he wanted to know what was the matter, and you sent another telegram saying come?
A. I think only one that day.
Q. And when he got there your papers were all ready and he was served with the summons?

A. I think so.
Q. And that was the object of that telegram?

Objected to.

51 Redirect examination by Mr. MARQUETT:

Q. What time did he reach there?
A. I could not tell you.
Q. Did you know anything about it when he was served?
A. No, sir.
Q. You don't know when he reached there or when he went away or when he was served?
A. No; I do not.

And thereupon forthwith, upon said plaintiff leaving the witness stand, the said defendant duly presented to the court the following plea in abatement to the jurisdiction of the court, and asked leave of the court that the same might be filed, and the same was filed and is in words and figures, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY, Defendant.

Plea to the Jurisdiction.

Now comes said defendant and presents this its plea to the jurisdiction of the court and says—

That it is a corporation organized under the laws of the State of Iowa, but has never previous to this date transacted any business in this State of Nebraska or had any office in this State.

That on and previous to the 22nd day of December, A. D. 1888, the plaintiff had caused to be prepared his petition in this
52 action, and, there being no officer or other person in the State of Nebraska upon *which* service of summons could be made, the said John Fitzgerald, for the sole purpose of getting service on the defendant, through a fraud, trick, and device sent a telegram to S. H. Mallory, president of this defendant company, at Chariton, Iowa, his place of residence, in substance that he should come to Lincoln, Nebraska, without disclosing for what said plaintiff desired his (Mallory's) presence in said city of Lincoln; that said message was sent solely for the purpose of inducing said Mallory to go to Lincoln, Nebraska, in order that said plaintiff might get service on him as president of this defendant company, and that as soon as said Mallory got into the jurisdiction of the court summons was served on him in this action; that said plaintiff and said S. H. Mallory concealed from said defendant the circumstances under which said service was made, and defendant did not discover the facts until on the 21st day of June, 1889, after the trial of this case

had commenced, and had no means of discovering the facts prior to that time.

And this defendant says that the service of the summons in this case was obtained by fraud and by a trick practiced by said plaintiff, and said Mallory, acting in concert with plaintiff, concealed said facts, so that this defendant did not obtain such information until this 21st day of June, A. D. 1889.

That by said act of the plaintiff he sought to invest the district court of Lancaster county, Nebraska, with jurisdiction of this defendant, and did not otherwise obtain service upon said defendant except through said trick, fraud, and device, so practiced as aforesaid; that when said defendant filed demurrer to plaintiff's petition in the district court of Lancaster county, Nebraska, and its petition for removal to this court, and when it filed its answer and amended answer herein, it did not know and had no means of knowing the fraud that had been practiced upon it by said plaintiff.

53 That said Mallory resides in Chariton, Iowa, and went to Lincoln, Nebraska, in obedience to said telegram of John Fitzgerald and would not have gone but for the same, and thereafter, acting in concert with said plaintiff, concealed said facts from this defendant.

Wherefore defendant prays that all further proceedings herein shall be stayed and this action be dismissed for want of jurisdiction.

M. T. FRAME,
Att'y for Defendant.

THE COUNTY OF DOUGLAS, } ss:
District of Nebraska, }

M. T. Frame, being duly sworn, says that he is the attorney of said defendant and had read the within and foregoing petition and plea to the jurisdiction, and the matters and things therein stated are true.

M. T. FRAME.

Subscribed *in* and sworn to before me this 21st day of June, A. D. 1889.

ELMER D. FRANK, *Clerk.*

And the within and foregoing, together with the affidavit annexed to said plea in abatement to the jurisdiction of the court, being all the evidence offered or considered by the court thereon, and the same being argued by counsel, was by the court overruled; to which action and ruling of the court the said defendant at the time duly excepted; and thereafter, the said plaintiff having rested his case, the said defendant duly filed its motion for a nonsuit for reasons in said motion contained, which is in the following words and figures, to wit:

Motion for Nonsuit.

In the Circuit Court of the United States for the District of Nebraska.

54 JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Defendant moves the court for a nonsuit herein for the following reasons, to wit:

First. Because this court has no jurisdiction of the defendant or of this action.

Second. Because it appears from the petition that the defendant is a foreign corporation and was improperly sued in Lancaster county, Nebraska.

Third. Because the said district court of Lancaster county, Nebraska, had no right, power, or authority to take jurisdiction of this action or of this defendant.

Fourth. Because it does not appear from the pleadings and evidence that this action has been brought in compliance with sec. 59 of the Code of Civil Procedure.

Fifth. Because in and by said sec. 59 of the code the district court of Lancaster county, Nebraska, and this court had and has no jurisdiction of this action or of this defendant.

Sixth. Because it does not appear from the pleadings and evidence that said action was properly instituted in any court in the State of Nebraska, or that the district court of Lancaster county, Nebraska, ever acquired any jurisdiction of said defendant, or that this court has any jurisdiction of this defendant.

M. T. FRAME,
B. P. WAGGENER,
Att'ys for Def'ts.

And the same was argued by counsel and considered by the court and was by the court overruled and denied, and to which action of the court the defendant at the time duly excepted; and the evidence in said case having been concluded, and there being
55 no further evidence on the question of the manner of such service on said defendant company, the said defendant filed its motion to dismiss said action for reasons in said motion contained, which is in words and figures, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendants.

Motion to Dismiss.

Now comes said defendant and moves the court to dismiss this action for the following reasons, to wit:

First. Because the said plaintiff used the process of the court for the purpose of fraudulently obtaining service on the defendant.

Second. That it appears from the evidence that the said plaintiff enticed the president of the defendant company into the State of Nebraska for the purpose of getting service on the defendant company, a foreign corporation, and that such trick and fraud was concealed from the defendant by said plaintiff and said S. H. Mallory until during the trial of this case.

Third. Because it appears from the evidence that the answer filed herein was filed by the defendant in ignorance of such fraud and trick of the said plaintiff.

Fourth. That said defendant would not have filed answer herein had it been advised of such trick and fraud, and that at the time said summons was served the said S. H. Mallory, president, was not in the State of Nebraska on any business for defendant company.

Fifth. Because it appears from the evidence that defendant is a foreign corporation and has not transacted any business in
56 the State, and at the time suit was brought and summons served on S. H. Mallory defendant had no general managing agent and no managing agent in this State and had no office or place of business in this State.

Sixth. Because this action was improperly brought in the State of Nebraska, and service of summons was a trick, fraud, and deception to obtain jurisdiction of the defendant.

M. T. FRAME,
B. P. WAGGENER,
Att'ys for Defendant.

And in support thereof filed the following affidavit, to wit:

In the Circuit Court of the United States, District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

THE COUNTY OF DOUGLAS, } *ss:*
District of Nebraska, }

M. T. Frame, being first duly sworn, deposes and says that he is attorney for this defendant and has been since this action was instituted; that at the time he filed demurrer and answer herein he did not know, and the defendant did now know and had no means of knowing, the trick and fraud that had been practiced by the plaintiff for the purpose of obtaining service on the defendant in this action; that such trick and fraud was not discovered by defendant until disclosed by the plaintiff in his cross-examination on the trial of this case, and immediately thereafter defendant filed its plea in abatement and to the jurisdiction of this court; that said S. M. Mallory concealed from the defendant and did not disclose the facts and

circumstances under — such service was made, and in concealing such facts was acting in concert and collusion with the said plaintiff, as affiant believes, for the purpose of aiding said plaintiff in his said fraud, trick, and deception; and further says not.

57

M. T. FRAME.

Subscribed and sworn to before me this 24th day of June, A. D. 1889.

ELMER D. FRANK, *Clerk.*

And there being no further evidence on such motion than as hereinbefore contained, and the same being argued by counsel and considered by the court, was by the court overruled and denied; to which action and ruling of the court the defendant at the time duly excepted, and prays that this its bill of exceptions will be allowed, signed, and sealed and made a part of the record herein, which is accordingly done.

Witness my hand this 24th day of June, A. D. 1889.

(S'g'd) ELMER S. DUNDY, *Judge.*

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 340 M. John Fitzgerald *vs.* Fitzgerald & Mallory Construction Company. In U. S. Circuit Court for Nebraska. Bill of exceptions. Filed June 24, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the said May term of said court, on the 25th day of June, 1889, the following proceedings were had and done in said cause, as appears of record on folio 568, Journal "N" of said court, to wit:

JOHN FITZGERALD.
vs.
FITZGERALD AND MALLORY CONSTRUCTION COMPANY } 340 M.

On this day again come the parties hereto, by their attorneys; also come the jurors empaneled and sworn herein into open court and present to the court their verdict, which is in words and figures following, to wit:

Verdict.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION CO., Defendant.

We, the jury, find the issue for the plaintiff and assess the amount of his recovery at $47,937.97, debt, and $3,474.65, interest thereon at

7% from 25th day of June, 1889, being the sum total of ($51,412.62) fifty-one thousand four hundred twelve and $\frac{62}{100}$ dollars.

W. S. McGOWAN, *Foreman.*
WALT. M. SEELEY.
JNO. L. STEPHENS.
P. W. WARREN.
A. R. GOOLSBY.
JOHN MANNING.
JOS. W. WARREN.
J. S. EDWARDS.
JNO. W. CULP.
WM. LEHMER.
JOHN BECKER.
BARROTT SCOTT.

58 Thereupon, afterwards, to wit, on the 28th day of June, 1889, motion in arrest of judgment was filed in said case; which said motion is in words and figures following, to wit:

Motion in Arrest of Judgment.

In the Circuit Court of the United States in and for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Now comes the said defendant and moves the court to arrest judgment on the verdict herein for the following reasons, to wit:

1. Because the district court of Lancaster county, State of Nebraska, in which this case was originally instituted, did not acquire any jurisdiction of the said defendant.

2. Because this court has no jurisdiction of the said defendant.

3. Because it conclusively appears from the testimony introduced on the trial of said case and the admissions of the plaintiff that the said plaintiff induced S. H. Mallory, president of said company defendant, into the jurisdiction of the court by false and fraudulent representations, and for the sole purpose of obtaining service of summons on him to obtain jurisdiction of the said defendant; and the said plaintiff and the said S. H. Mallory, acting in concert and collusion with each other to cheat and wrong the defendant, concealed from the said defendant the said trick and device by which said plaintiff obtained service of summons until after the defendant had fully demurred and answered herein and until the trial of said case.

5. That said action was improperly brought in the district court of Lancaster county, Nebraska, and service of summons was
59 obtained upon the said defendant by a fraudulent trick and device, all of which facts were fraudulently concealed from

said defendant by the said plaintiff and S. H. Mallory until during the trial of said case, when said plaintiff admitted such fraud and deception so practised by him on the said defendant for the purpose of obtaining service of summons.

6. Because this court has no jurisdiction to enter any judgment on the verdict of such fraudulent trick and deception resorted to by the said plaintiff for the purpose of obtaining service of summons.

7. Because the said petition, as amended in this said action and as originally filed herein, does not state any facts sufficient to constitute any cause of action, and shows affirmatively on its face that the district court of Lancaster county, Nebraska, and this court never acquired any jurisdiction of said case or had any right, power, or authority to try and determine the matters and things in controversy between the plaintiff and defendant.

M. T. FRAME,
B. P. WAGGENER,
Attorneys for Defendant.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 340 M. John Fitzgerald, plaintiff, *vs.* The Fitzgerald and Mallory Construction Company, defendant. Motion in arrest of judgment. Filed June 28, 1889. Elmer D. Frank, clerk. M. T. Frame and B. P. Waggener, att'ys for defendant.

Thereupon, afterwards, to wit, on the said 28th day of June, 1889, motion for new trial was filed in said case; which said motion is in words and figures following, to wit:

Motion for a New Trial.

In the Circuit Court in and for the District of Nebraska.

60 JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Now comes the said defendant and moves the court to set aside the verdict herein and grant a new trial for the following reasons, to wit:

1. Irregularity in the proceedings of the court, by which the said defendant was prevented from having a fair trial, in this, to wit, that the court on the trial of said case allowed the said plaintiff, over the objection of and subject to the exception of defendant to amend his petition in several respects, changing the causes of action and presenting new issues to be tried, which the said defendant did not have any opportunity of meeting or making any preparation for.

2. An abuse of discretion by the court in permitting said plaintiff to amend his petition on the trial of said case by substantially chang-

ing the cause of action without giving the said defendant an opportunity to meet such new issues and to procure and introduce testimony in opposition thereto.

3. Misconduct of the plaintiff's attorney, whereby the defendant was prevented from having a fair and impartial trial, in this, to wit, that in the discussion and argument of said case before the jury T. M. Marquett, attorney for the plaintiff, stated in substance that Russell Sage and Jay Gould had joined hands with the Missouri Pacific Railway Company in the employment of attorneys for the purpose of preventing the said plaintiff from securing what was his just due, which said statement was made without any evidence to support it and was not justified by the circumstances of said case, and was duly objected and excepted to by the said defendant at
61 said time the same was made to the jury.

4. Accident and surprise which ordinary prudence could not have guarded against, in this, to wit, that the court permitted the said plaintiff to amend his said petition in the third count or cause of action set forth therein by alleging in substance that said plaintiff, although not acting under express agreement or contract, performed services for said defendant between the 1st day of — November, A. D. 1886; that the value of such services was worth the sum of six thousand dollars ($6,000); which said amendment of said petition was duly excepted to by said defendant at the time the same was allowed to be made.

5. Excessive damages appearing to have been given under the influence of passion and prejudice in this, to wit, that the said jury wholly ignored the instruction and direction of the court on the trial of said case and allowed the said plaintiff an amount in excess of that claimed by the said plaintiff in his said petition and in excess of the amount authorized to be allowed under the instructions of the court.

6. Error in the assessment of the amount of recovery, the same being too large, in this, to wit, the jury allowed the said plaintiff for the amount claimed in the said third cause of action in violation of the instructions of the court and against the great weight and preponderance of testimony, and when there was no testimony of any kind or nature to sustain such allowance.

That the said jury allowed the said plaintiff the amount claimed in the fourth cause of action for salary and compensation due the said plaintiff from the 1st day of May, A. D. 1886, to the 1st day of November, A. D. 1886—for services rendered the said defendant as general manager of said defendant company, the sum of six thousand dollars ($6,000)—which was contrary to the instructions of the court and not sustained by sufficient evidence and in viola-
62 tion of the contract and agreement between the said plaintiff and defendant alleged and set forth in his said petition.

That the said jury allowed the said plaintiff for the amount claimed in his sixth cause of action against the weight of the evidence and contrary to the instructions of the court.

That the said jury allowed to the said plaintiff the amount claimed in the seventh cause of action, contrary to the instructions of the

court and in violation of the testimony that had been offered on the trial of said case, and not supported by evidence of any kind or nature, and should have been excluded by the jury.

That the jury awarded to the plaintiff the amount claimed in the eighth cause of action, notwithstanding the instructions of the court that they should entirely exclude said eighth cause of action and not allow said plaintiff anything therefor.

That the said jury, in violation of the instructions of the court and contrary to the evidence introduced on the trial of said case, allowed the said plaintiff the amount claimed in the ninth cause of action.

That the jury, contrary to the instructions of the court and in total disregard of the testimony offered on the trial of said case, allowed the said plaintiff the amount claimed in the 10th cause of action.

That the jury, contrary to the instructions of the court and in total disregard of the testimony on the trial of said case, allowed the said plaintiff the amount claimed in the 11th cause of action.

That the said jury, contrary to the instructions of the court and in total disregard of the testimony offered on the trial of said case, allowed to the said plaintiff the amount claimed in the 14th cause of action.

7. That the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

63 8. Newly discovered evidence material to the said defendant, which it could not with reasonable diligence have discovered and produced at the trial of said case.

9. Error of law occurring at the trial and excepted to by the defendant at the time.

10. Error of the court in overruling and denying the plea of the said defendant to the jurisdiction of the court.

11. Error of the court in refusing to dismiss said action when it was made to appear to the court that the said plaintiff had resorted to a trick and a fraud for the purpose of obtaining jurisdiction of the said defendant company, which fact was not known to the said defendant company until during the trial of said case.

12. Error of the court in overruling and denying the motion of said defendant for a nonsuit at the close of the evidence of the plaintiff.

13. Error of the court in overruling and denying the motion of the said defendant to dismiss the said action for want of jurisdiction when said motion was presented.

14. Error of the court in admitting incompetent, irrelevant, and immaterial evidence offered by the said plaintiff and which was admitted on the trial of said case over the objections of the said defendant and subject to its exceptions, which evidence and exceptions are specially referred to in the transcript of the evidence.

15. Error of the court in permitting the said S. H. Mallory to testify as to conversations he had with individual members of the board of directors of the said defendant company.

16. Error of the court in permitting the said S. H. Mallory to

testify that he had authority to execute any of the said notes and drafts sued on in plaintiff's petition.

64 17. Error of the court in permitting the said D. J. Thayer and S. H. Mallory to testify on the trial of said case that the said notes or either of them were given for the benefit of said defendant company.

18. Error of the court in permitting the said several vouchers to be introduced in evidence against the said defendant.

19. Error of the court in permitting to be read in evidence the said two contracts between the defendant company and the Denver, Memphis & Atlantic railway and the Missouri Pacific Railway Company.

20. Error of the court in permitting to be offered in evidence either or any of said several promissory notes and drafts sued on, all of which were objected to by the said defendant and admitted in evidence over the exceptions of said defendant.

21. Error of the court in permitting D. J. Thayer to testify to the services performed by John Fitzgerald for said defendant company between the 1st day of May, A. D. 1886, to the 1st day of November, A. D. 1886.

22. Error of the court in permitting the said D. J. Thayer to testify as to the value of such services without first showing that the said defendant had some notice or knowledge of the services so performed by the said plaintiff, and that said services were accepted by said defendant, and without showing or alleging that there was an express contract or agreement to pay therefor.

23. Error of the court in its general charge in using the following language, to wit: "It seems to me, all things taken together, that he would have the clear right to make contracts and to pay for them when the work was done, and to buy the things necessary to enable him to carry on the business with success, and, in short, to do anything and everything in and about the matter that is not inconsistent with the resolution referred to until he was otherwise noti-

65 fied by the company;" to which part of said instructions the said defendant excepted, and urges its said exception as error of law occurring on the trial of said case.

24. Error of law in making the following statement in the general charge to the jury, to wit: "Supposing a note was placed in the bank that was properly given—that is, it was given by the defendant to pay one of its obligations incurred in the building of the road in question, and that Mr. Fitzgerald had become an indorser on that note so that he was liable to pay it—he might very properly endorse such a note—and, by the way, I will go still further and say that if the jury are satisfied from the testimony that the note was given to pay one of the notes and lawful obligations of the defendant company, then Mr. Fitzgerald could properly endorse it and the president of this concern could properly give it. It is simply an evidence of the fact that money was borrowed. If the proof shows that the note went into the business the president could properly give that note, and if Mr. Fitzgerald endorsed it and had it to pay the obligation would be complete on the part of the defendant, and the plain-

tiff would be entitled to recover on that note;" to which defendant excepts.

25. Error of law in instructing the jury that "if the plaintiff acted as general manager and transacted the usual business that devolves upon the general manager of such a concern with the knowledge and consent of the defendant, it seems to me that there would be an implied agreement on the part of the defendant to pay what those services were reasonably worth," there being no allegation or evidence to sustain, support, or authorize such instruction; to which defendant excepts.

26. Error of law in giving the following instruction, as asked by the plaintiff, to wit: "In the absence of contrary instructions by the board of directors the president shall be charged with the general management of the business of the company; and if you fur-
66 ther find that in the operations by which the debts in question were incurred—that is to say, the building of the roads in Kansas and Colorado—the president was given entire management in the building of the same and in the incurring of liabilities and in the paying off of debts incurred, you will find that he had a right to appoint other agents, such as cashier and auditor, for the purpose of making the calculations on pay-rolls and on contracts for building such roads, and he had the power to empower any one of the said agents who made said calculations upon the pay-rolls of the amount due to those who did the work on said railroads by contracts or otherwise, and also to draw any checks, bills, or sight drafts that might be necessary to pay the same, and, if it it became necessary for the benefit of said company to execute promissory notes or to draw sight drafts, the president would have ample authority to do the same, and might likewise empower the cashier or the party whose duty it was to ascertain the amounts due to contractors, material men, and persons working upon the constructions of said railroad building by the construction company to draw drafts or checks or even to make promissory notes, and that the same, if done for the company and for its use and benefit, would be binding upon the said company unless the president received from the directors contrary instructions which would limit his authority in the premises;" to which defendant excepts.

27. Error of the court in giving the following instructions asked for by the plaintiff: "As incident to its general powers, the Fitzgerald and Mallory Construction Company had the power to borrow money for the purposes of the corporation and to invest certain officers with authority to negotiate loans and to execute notes and to sign checks against its funds, and it is well-settled law that the existence of such authority in subordinate officers may,
67 in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves;" to which defendant excepts.

28. Error of the court in giving to the jury the following instructions: "If the jury believes from the evidence that S. H. Mallory, the president, was authorized to draw checks on an account or

against its account and, as president, was authorized as its agent to determine accounts against it, the jury would have the right to imply from these acts a recognition of the board of directors that said Mallory had the right to execute a note or notes in existence executed by him, and especially would this be the case providing the jury further find that the money thus obtained from said notes or by virtue of said notes was used to pay off the indebtedness of the said Fitzgerald and Mallory Construction Company. As to the promissory notes which were endorsed by the plaintiff and upon which he was held as endorser, if the jury believes from the evidence that said notes were executed in good faith by the president of the construction company and that the proceeds of the notes or drafts for which the note was given is a renewal were received by and used for the benefit of the construction company, and you further find that the plaintiff is the owner and holder of said notes, you will find for the plaintiff for the full amount of said note, with interest;" to which defendant excepts.

29. The said court erred in giving the following instructions to the jury, excepted to by defendant: "If the jury believes from the evidence that the promissory notes and sight drafts which have been put in evidence in this case were notes which were renewed to take up other notes, drafts, or checks given for the purpose of borrowing or procuring money for the Fitzgerald & Mallory
68 Construction Company, and that the money so realized upon the same was received by the said company, then you will find that the company, having retained for its own benefit the proceeds of these transactions, is estopped to deny as against the holder the binding character of the obligation and the authority of the president or auditor in the transaction.

30. The said court erred in giving the following instruction, to wit, to which the defendant excepts: "As to the money due on drafts and promissory notes, the jury are instructed that the law is as follows: If the money was fairly borrowed for the corporation and the notes were given for it and the funds *was* honestly applied in the payment of pressing liabilities of the company, and after the same was done the directors individually were advised of the transactions, it would be a perversion of the plain principles of reason and judgent to permit the validity of such security to be effectually denied, and if you find the facts to be as above stated you will find for the plaintiff the full amount of said promissory note, with interest."

31. Said court erred in giving the following instructions to the jury, to which defendant excepts: "And although there may be a provision in the by-laws of the said construction company requiring certain formalities in the execution of a promissory note or draft, yet that does not necessarily make such formality essential to the ratification of the contract entered into, and if you find from the evidence that said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, you will find that the said act of the president has been fully corroborated, and

you will find for the plaintiff the full amount of said notes,
69 with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them."

32. Because the court erred in giving inconsistent and conflicting instructions to the jury in such a manner as to mislead the jury and prevent them from having a fair understanding of the law applicable to this case.

33. Because the court erred in refusing to give instructions No. — asked for by the defendant on the trial of said case.

34. Because the court erred in its general charge to the jury in each and every part thereof, and in refusing to give each and every special instruction prayed for by the defendant.

35. Error of the court in permitting the said plaintiff to show the value of services performed by him as general manager of defendant or as vice-president and treasurer of said defendant between May 1st and November 1st, 1886.

36. Error of the court in instructing the jury that the plaintiff might recover on an implied agreement a reasonable compensation for services performed by him as general manager of defendant company.

37. Because the court erred in its general charge to the jury in the following statement and instruction, to which defendant duly excepted: "If Mr. Fitzgerald rendered the services that usually devolved on a general manager, if he devoted his time, talents, and energies to that particular business, it seems to me that there would be an implied agreement to pay what his services in that regard were reasonably worth. So, if you find that to be the case, you can make such allowance for his services from the 1st *to* the 6th of May to the 3rd of November following, 1886, for that service."

M. T. FRAME,
B. P. WAGGENER,
Att'ys for Defendant.

70 Upon the back of said motion appear endorsements in words and figures following, to wit: No. 340, M. John Fitzgerald, plaintiff, *vs.* The Fitzgerald and Mallory Construction Company, defendant. Motion for new trial. Filed Jun- 28, 1889. Elmer D. Frank, clerk. M. T. Frame & B. P. Waggener, att'ys for defendant.

Thereupon, afterwards, to wit, at the November term of said court, on the 5th day of December, 1889, the following proceedings were had and done in said cause, as appear of record on folio —, Journal "N" of said court, to wit:

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY. } 340 M.

Judgment.

Now, on this 5th day of December, 1889, at the November term,

1889, of said court, the court having had under advisement the motion in arrest of judgment and the motion for a new trial, and being fully advised in the premises, overrules each of said motions; to which action of the court in denying each of said motions defendant duly excepted; and thereupon the court, over the objection and subject to the exceptions of defendant, entered judgment on the verdict of the jury in favor of plaintiff and against the defendant for the sum of $51,412.62.

It is therefore by the court ordered, adjudged, and decreed that said plaintiff do have and recover judgment of and from the defendant for the sum of fifty-one thousand four hundred twelve & $\frac{62}{100}$ ($51,412.62) dollars, debt, with interest from June 25, 1889, and costs of suit, for which let execution issue; to which defendants excepted.

70½ Thereupon, afterwards, at the November term of said court, on the 30th day of December, 1889, the following proceedings were had and done in said cause, as appear of record in Journal "N" of said court, to wit:

JOHN FITZGERALD
vs. } 340 M.
THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY.

And now, on this 30th day of December, 1889, the said defendant, by its attorney, duly presented in open court at said November term, 1889, its certain bill of exceptions, which, having been examined by counsel, and both parties, by counsel, being present, is allowed, signed, and ordered to be filed with the records in this cause.

And the defendant having duly applied for a writ of error to have reviewed the judgment and proceedings of this court by the Supreme Court of the United States, the same is allowed and the clerk is directed to certify the records and proceedings of this court to the Supreme Court of the United States.

71 Thereupon, afterwards, to wit, on the 20th day of December, 1889, bill of exceptions were filed in said case; which said bill of exceptions are in the words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States in and for the District of Nebraska.

JOHN FITZGERALD, Plaintiff,
vs.
THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Defendant.

Be it remembered that on the trial of the above-entitled cause before a jury duly empaneled and sworn, as by law in such cases made and provided, the following evidence was offered and produced by the plaintiff and defendant in order, to wit:

S. H. MALLORY sworn and testifies for and on behalf of the plaintiff.

Examined by T. M. MARQUETT:

Q. Where do you reside?
A. At Chariton, Iowa.
Q. What is your occupation?
A. A railway contractor and civil engineer
Q. How long have you been a railway contractor?
A. I think 23 years.
Q. Have you been engaged in the meanwhile pretty actively in the building of railroads?
A. About all the time.
Q. Are you a member of the firm of Mallory and Cushing, of this place?
A. Yes, sir.
Q. The senior member?
A. Yes, sir.
Q. Did you ever have a contract in conjunction with Mr. Fitzgerald to build a line of railroad in Kansas?

Objected to as immaterial. Overruled, and defendant excepts.

72 A. I did; yes, sir.
Q. What was the extent of that contract?

Objected to as not the best evidence.

By Mr. WAGGENER: Was that contract in writing?
A. Yes, sir.
Q. How much of a railroad were you building? What was the extent of the line?

Objected to as not the best evidence. Overruled, and defendant excepts.

A. Across the State of Kansas from the east line to west line, about 450 miles.
Q. At what time was that contract taken?
A. It was taken in the spring of 1885. Mr. Fitzgerald had been in correspondence with the railroad company and he came to me and asked me to join him, and I looked the matter over and went in with him and built this road.
Q. When did you have in view the formation of an incorporated construction company?

Objected to as immaterial.

Mr. MARQUETT: We will defer that till I get the authorities.
Q. What time was the corporation of the Fitzgerald and Mallory Construction Company formed?

Objected to as not the best evidence. Overruled, and defendant excepts.

A. In April, 1886.

Q. You may look at this book and state what it is.

A. It is a copy of the records of the construction company as kept by the secretary of the company.

Plaintiff offers in evidence pages 15, 16, and 17 of the records. Defendant objects, because it purports to be a copy of the contract, and that no proper foundation has been laid for its introduction into evidence; incompetent, irrelevant, and immaterial.

73 Overruled, and defendant excepts. Copy of same is hereto attached, marked "A."

Plaintiff offers in evidence pages 18, 19, and 20 of said record. Same objection, that no proper foundation has been laid for its introduction into testimony; that it purports to be a copy of the contract; irrelevant, immaterial. Overruled, and defendant excepts. Copy hereto attached, marked "B."

By agreement the whole record was introduced into evidence subject to the above objection by the defendants.

The 3rd by-law of the corporation was then read to the jury by Marquett. Copy is hereto attached, marked "C."

Q. Did you hold any official position in the Fitzgerald and Mallory Construction Company?

A. I was president of the company.

Q. When were you first elected as president of the company?

A. At the organization of it, in 1886.

Q. And have you been president of it ever since?

A. I put in two contracts. One is with the Denver, Memphis and Atlantic railway and the other with the Missouri Pacific railway.

—. When thes contracts were made was there any money in the treasury to do the work?

Objected to as immaterial. Overruled, and — excepts.

A. There was not.

Q. How was the money in the first instance raised? How was it to be raised and how was it raised?

Objected to as not the best evidence. Overruled, and defendant objects.

A. By the construction company?

Q. Yes, sir; how was it to be raised?

A. Our understanding when the contract was to be made——

By the COURT: Don't you know how the money was to be raised?

74 A. By an assessment upon the stockholders. The capital was a million dollars, and at the time of the organization Mr. Fitzgerald and myself had a large amount invested in the construction of the road. It was understood when the contract was made we were to turn over the roads in construction, and on each ten miles were to receive 5% bonds of the Missouri Pacific Railway Company, and that the stockholders would never be called upon to pay over thirty per cent. of their subscriptions.

Q. I see by the contract with the Missouri Pacific Railway Company bonds were to be delivered on the completion of every 10 miles of road. Why was that? What was the object of that?

A. The object of that was to furnish the money to the construction company and provide for the construction of the next 10 miles.

Q. That is, to sell the bonds then delivered?

A. Yes, sir.

Q. And how was the first money raised that went into that organization and went into the construction of that road?

A. I think the first was an assessment of ten per cent. upon the stockholders.

Q. Was that the first money you got after the organization of this company to do this work? Was the first money procured by an assessment.

A. Before the contract was made I went to New York and an understanding was had. We had to build about 24 miles of road in sixty days.

Q. Why was that?

A. In order to earn $50,000.00 of township bonds in La Bette county. I went to New York and had a verbal understanding with the people there that we should go ahead and perfect our arrangements in Kansas with the Denver, Memphis and Atlantic Company and then to come back there and complete the contract, and
75 in the meantime we had to start this work and we had to borrow money, and the engineer drew upon Mr. Fitzgerald for money in order to keep the work in progress.

Q. About how much did he furnish before another from any other source was procured?

A. I cannot tell that. It amounted to somewhere between five and ten thousand dollars at that time.

Q. Did the directors in New York know of his furnishing this money and of your borrowing money?

Objected to.

By Mr. WAGGENER:

Q. Was this before the incorporation?

A. I cannot state just now. Part of it was before and a part of it was after. It was before any assessment was made upon the stockholders. We had to have the money to pay the expenses, and drafts were made on Mr. Fitzgerald for that purpose.

Q. Can you give about how much was borrowed of Mr. Fitzgerald before the incorporation was organized?

A. I did not keep the accounts and I am not prepared to state that amount, but the books will show the amount.

Q. When was the first money raised by the sale of bonds?

A. Some time in February, 1887.

Q. When was the first bonds delivered by the Missouri Pacific?

A. About that time.

Q. You may state about how much of the road in all was built by this construction company for the Missouri Pacific Railway Company—how many miles.

A. The construction company had two contracts with the Missouri Pacific Railway Company; one for the building of a road across the State of Kansss—the Denver, Memphis & Atlantic—and in Colorado from the State line to Pueblo. The D., M. & A. was supposed to be about 450 miles, and the State Line & Pueblo, in Colorado, about 150 miles.

76 Q. About what did it cost to construct this whole line?

A. In the neighborhood of $7,000,000.00.

Q. Who attended to the business of constructing these lines for the construction company?

A. I, as president, had full charge of the location of the road and the construction.

Q. Had you any instruction from the directors how to do it, when to do it, and anything about it?

A. No, sir; not from the directors.

Q. That is, the directors in New York as to the mode and manner of doing the work?

A. No, sir.

Q. Who disbursed the money paid out and who determined what was due from the construction company?

A. In our organization we had a cashier and an auditor, and our rules were that no money should be paid out until certified to by the proper party that had charge of the work, and the accounts were presented to the office, audited by the auditor, and approved by him and then by me as president.

Q. Where was the treasurer; where did he reside; where did he hold his office?

A. We had two treasurers. At the beginning of the contract Mr. Fitzgerald was treasurer, and in the fall of 1886 he resigned and Mr. Cross, of New York, was appointed.

Q. When was all that work which you have testified was done by — for the Missouri Pacific Railway Company for the Denver, Memphis & Atlantic railway—when was that finished?

A. We completed the contract of the Denver, Memphis and Atlantic. The contract was completed to Pueblo in December, and all the road we had built was turned over to ——. Of course, portions of it had been turned over before—the balance in Colorado was turned over December 15th. It was not yet completed, and we worked probably 60 days longer, putting in the sidings and building the buildings.

77 Q. When was it turned over to the Missouri Pacific railway, and when did they commence to run it?

A. December 15th, 1887.

Q. Where, at this time, were you getting money to pay off the contractors for debts necessarily incurred in this road?

A. By drafts on the treasurer in New York.

Q. Who drew those drafts?

A. They were drawn by me or in my name. D. J. Thayer was authorized to draw in my name.

Q. They were drawn in your name and under your authority?

A. Yes, sir.

Q. How was it disbursed? Who done that? Was it drawn out of our local banks?

A. I would make a draft and give it to the cashier and he would take it to the local bank and deposit it and the construction company would receive credit for it, and the banks were authorized to honor his checks, and as long as we had a cashier that was so. After the work was completed we found it necessary to cut off expenses. We discharged our cashier and let the auditor do that business.

Q. That is, the auditor done the business of the cashier and auditor?

A. Yes, sir. That occurred after all the work was completed.

Q. What were the auditor's duties in matters of this kind?

A. He had charge of and kept the accounts of the company.

Q. And he determined how much was due material men, the contractors, and laborers?

A. Yes, sir.

Q. Now did you draw any drafts on the treasurer for this work that was dishonored—that was not paid?

A. Yes, sir. (Hands witness papers.) These drafts were made by me and not paid.

78 Q. And they came back with what written on them?

A. "No funds."

Plaintiff offers in evidence the drafts as identified by the witness and marked "1," "2," "3," "4," and "5." No objection being made, the same were read in evidence.

Q. After you drew these drafts did you ever draw any others and get the money from the treasurer? Were those drafts overpaid?

A. No, sir.

Q. Did you receive this letter from the treasurer? (Hands witness paper marked "6.")

A. Yes, sir.

Q. You received that?

A. Yes, sir.

Q. What means had the treasurer and directors in their hands to get the money to pay these drafts that you drew on them and that you know of?

A. There was a large amount in contracts due from the Missouri Pacific Railway Company for rolling stock furnished, extra work done, and overcharges on freight.

Q. Had the treasurer ever paid any bills to the Missouri Pacific Railway Company without your knowledge, which was due it?

Defendant objects as incompetent and immaterial. Sustained, and — excepts.

Q. Look at that note. Whose signature is that? (Hands witness a paper.)

A. That is my signature as president of the company.

Plaintiff offers in evidence the note as identified by the witness

and marked Exhibit "A 1." Objected to by the defendant for the reason that there is no proper foundation laid for the introduction of the testimony by showing that S. H. Mallory had any authority to execute the note; incompetent, irrelevant, and immaterial.

79 Overruled, and defendant excepts.

Q. Do you know what that note of which this is a renewal was given for?

Objected to by defendant as not being in issue in this case. Overruled, and defendant excepts.

A. This question was not answered by the witness.

Q. Look at this draft. Whose signature is that? (Hands witness a paper.)

A. That is the signature of the Fitzgerald and Mallory Construction Company, by S. H. Mallory, president, by D. J. Thayer, auditor.

Q. There are three checks like that?

A. Yes, sir.

Q. State what those three checks were given for and to whom?

A. Those drafts were given to Bracey Brothers in final settlement of their account on their contract for laying track.

Q. Who was the work done for?

A. It was done for the Fitzgerald and Mallory Construction Company. When their work was completed they came to St. Louis and demanded settlement and payment and we had no funds in the treasury to pay them, and they brought their banker with them by the name of Omer from Salina, who had loaned them money, and said they would put a lien on the road unless it was paid, but if we could give them some paper that could be cashed that would be satisfactory, so we gave them a sixty days' sight draft with the expectation of getting a settlement with the Missouri Pacific Railway Company before that would mature and we would have funds to pay them.

Q. How was that? Did you have any settlement and did you have the funds to pay them?

A. We had not, and the drafts matured and we took them up with the note of the Fitzgerald and Mallory Construction Company.

Q. Is that the note? (Hands witness paper.)

A. I think it is.

Q. That is the note given in settlement of those sight drafts?

80 A. Yes, sir.

Q. When these checks became due what did you do; was there any money to pay them?

A. No, sir; this party assigned—Bracey Brothers assigned those drafts to E. W. Omer, and they were presented to us for payment, and we took them up with a note of the construction company, with interest.

Q. Did the parties accept the note of the construction company for them?

A. The banker?

Q. Yes, sir.

A. Yes, sir.

Q. Did they accept that as payment?

A. They accepted that in payment of those drafts.

Q. Did they not refuse to accept it unless you and Mr. Fitzgerald endorsed it?

A. Why, certainly they would not take them. They would not take it unless we endorsed it, and I notified Mr. Fitzgerald and requested him to endorse it.

Q. What bank was it?

A. The Union National Bank of Chicago.

—. And they refused to accept it without your endorsement?

A. Oh, yes; that was understood they would not do that.

Q. Was that taken up and another one given when that note became due; was there any money on hand to pay it?

A. No, sir.

Q. What did you do then?

A. Well, finally they refused to take the construction company's notes with our endorsement.

Q. And that note was taken up by the giving of the note I have shown you?

A. Yes, sir.

81 Q. And that is the note sued upon?

A. Yes, sir.

Q. And the note sued upon was given to take up the first note you had given, was it?

A. Yes, sir.

Q. Has that note been paid to the Union National Bank?

A. Yes, sir.

Plaintiff offers in evidence Exhibits B 1, B 2, B 3, B 4, B 5, and B 6, as identified by the witness. Defendant objects for the reason that no proper foundation has been laid for the introduction of the notes into evidence and no showing made that they were given by the authority of the company or the board of directors, irrelevant and immaterial. Overruled, and defendant excepts.

Q. Is that your signature? (Hands witness a paper.)

A. Yes, sir.

Q. Whose signature is that?

A. Which one?

Q. The first one.

A. John Fitzgerald's, and that is mine, S. H. Mallory.

Q. Did you ever see that note before?

A. Yes, sir.

Q. Who was that written by?

A. By C. M. Lamb, auditor.

Q. At that time was he holding any other position; was he also cashier?

A. That I cannot say. I cannot state the exact date he assumed the duties of cashier, but it was about that time.

Q. And that is a *drawn* drawn on you as president?

A. Yes, sir.

Q. Did you ever accept it?
A. Yes, sir; my name is there accepting it.
Q. That is your name, is it?
A. Yes, sir.
Q. Do you know what that note was given for? (Hands witness a paper.)

82 Objected to as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

A. It was to pay for the debts, to pay for the obligations of the company, for labor, material, small bills, in St. Louis from time to time. It was for funds which was used there.
Q. How were they used?

Objected to as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

A. It was used for that purpose.
Q. You may look at this. Is that your signature? (Hands witness a paper.)
A. Yes, sir.
Q. What is the date of that note?
A. July 30th, 1888.
Q. Is that a renewal note?
A. I think it was. In regard to all these notes, without making an exception, we could get no funds, and we had to get money where we could borrow it of the banks. I borrowed money of the bank at Chariton and at St. Louis, at the banks there, for the purpose of paying off the contractors for material furnished, bills in the St. Louis office, parties that furnished material for the construction, and for labor. We were building in addition to our contract in Colorado and Kansas. We had a little outside contract. We were building from Independence, Missouri, down to the D., M. & A. road, about 22 miles. That part of the contract we were to receive the money in cash and not in bonds of the Missouri Pacific railway, and they failed to pay that. We furnished all the material—steel, ties—and done the grading, and wanted to pay our laborers when we discharged them. We had to have the money to pay them and we borrowed the money, and these notes were all given for money to pay off laborers and for materials and supplies.

83 Q. And they are endorsed by you?
A. Yes, sir; and that is the whole fact of the business.

Plaintiff offers in evidence Exhibit "K 1," as identified by the witness. Defendant objects as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

Q. Do you recollect anything about that note?
A. Yes, sir; this was given to one of our bridge contractors in payment of any account due him.
Q. When you say "our bridge contractors" who do you mean? Who was the contract with?
A. It was with the Fitzgerald & Mallory Construction Co.

Plaintiff offers in evidence Exhibits "M 1" and "M 2," as identified by the witness. Defendant objects as irrelevant, incompetent, and immaterial. Overruled, and defendant excepts.

Q. There is another. What is that? (Hands witness a paper.)

A. That is a voucher in favor of John Fitzgerald for tools furnished the construction Co. at the commencement of the work. At that time there was a great deal of work for the graders, and it was hard to get tools from Mt. Pleasant on time, and we had a very short time to do the work, and I directed Mr. Fitzgerald to send down some tools, as he had some tools on hand, and he sent them down. The tools he did so furnish us was at a reduced price.

Mr. WAGGENER: What is the date of that?

A. The date of this voucher is May 13th, 1888, but the tools were furnished to us during the season of 1886. We had to furnish tools to our sub-contractors, and a portion of them were sold to them and were charged up to their accounts.

Q. Is that the price agreed upon for those tools?

A. There was no price agreed upon before, but I considered that a fair price for them.

84 Q. They were worth that, were they?

A. Yes, sir.

Plaintiff offers in evidence Exhibit "F 1," as identified by the witness. Defendant objected as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

Q. Look at that. What is that? (Hands witness a paper.)

A. That voucher is made out in favor of John Fitzgerald for a track-laying tram that we used in laying track from Cawkerville to I forget the name of the town. These trams were necessary during a portion of the construction. It is a very rough country there, and it is almost impossible to haul material with teams. With this tram we handled ties and rails on the train.

Mr. WAGGENER: what is the date of that?

A. That is May 7th, 1888, this voucher is made out in the office, but the tram was shipped there in 1886 and used there during the years 1886 and 1887, and I think the company got the worth of their money out of the tram. If we had not had that we would have had to get another one from some other party. We also used it in laying 300 miles in another portion of the road.

Q. And it was well worth the money you gave for it?

A. Yes, sir; it saved us that much money.

Plaintiff offered in evidence Exhibit "G 1," as identified by the witness. Defendant objected as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

Q. Is that your signature? (Hands witness paper.)

A. Yes, sir.

Q. And that is the auditor's signature, Mr. Lamb?

A. Yes, sir.

Plaintiff offers in evidence Exhibit "H 1," as identified by the

witness. Objected to as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

85 Q. And this is likewise your signature?
A. Yes, sir.
Q. And that is for what?
A. Expenses.
Q. Do you know anything about this bill?
A. That is a voucher in favor of — that was on the tram we was using. His contract was that he was to have $16.00 a mile for the use of the tram.
Q. As a royalty?
A. Yes, sir; that is, royalty on 21 miles. I approved that voucher as being correct.

Plaintiff offers in evidence Exhibit "M 1." Defendant objects as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

Q. Is that your signature by Mr. Lamb?
A. Yes, sir.
Q. How is that? (Hands witness paper.)
A. That is part of the other—that is a duplicate of the other.

Plaintiff offers in evidence Exhibits "D 1" and "E 1," as identified by the witness. Defendant objects as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

Q. After these notes which we have here were given in place of these sight drafts were the directors in New York notified of the fact?
A. Yes, sir.
Q. How long after the first notes were given (I don't mean the renewals) did you see the directors in New York and have any conversation with them about it?
A. I don't recollect. I visited them personally in April or May of the year 1888.
Q. When did you first go to see them after the notes were given?
A. It was in the fore part of May I was in New York.
Q. Did you refer — them in any directors' meeting or in a meeting of the directors? Was there anything said about this
86 indebtedness—the bills payable—that these notes were given; and, if so, what was it?
A. We talked in regard to that, and they said these matters should be settled up very shortly.

Mr. WAGGENER: Your honor, we object to that, and move to strike it out as hearsay. They were advised of it, and there never was any objection made to it.

Q. They never made any objection to the giving of these notes, did they?

Objected to as leading.

Q. Were you ever there afterwards at a directors' meeting at which this matter was again brought up?

A. Yes, sir; several times.

Q. What was said about it? How did they propose to pay them? What was said about how they should be paid?

Objected to as incompetent; sustained.

Q. I will ask this: State what, if anything—how they proposed—these directors—to pay these notes that were given.

Objected to as incompetent; sustained, and — excepts.

Cross-examination by Mr. B. P. WAGGENER:

Q. Are you interested in this suit?

A. No, sir.

Q. You have no interest, directly or indirectly?

A. No, sir.

Q. Are you a partner of Mr. Fitzgerald's?

A. No, sir.

Q. Were you before this company was organized?

A. We were in this contract; yes, sir.

Q. But you have no interest in this controversy?

A. No, sir.

Q. You have had the custody and control of these books all to this time?

A. I have had them at Chariton.

Q. Where you reside?

A. Yes, sir.

87 Q. And you have been keeping them in our office?

A. In the office of the Fitzgerald & Mallory Construction Company.

Q. But in the office you keep?

A. I do not keep it myself personally.

Q. But you have had supervision and control of these books all this time?

A. I have since they were put into my hands as receiver.

Q. And they were put into your hands as receiver at your request?

A. No, sir.

Q. But you acquiesced in the appointment of a receiver?

A. I do not know as I objected to it.

Q. Did you consent to it?

A. Yes, sir; I suppose so.

Q. And they were put into the hands of a receiver, and you brought them here?

A. No, sir.

Q. Did you not go after them yesterday?

A. No, sir; I did not go after them.

Q. What did you go for?

A. I went after some private papers.

Q. Did you not go to bring these papers under the order of the court?

A. No, sir.
Q. The books were not here before you went, were they?
A. No, sir.
Q. But you went one evening and they were here the next morning. Did you not bring them here?
A. No, sir.
Q. Did you request anybody to send them?
A. No, sir.
Q. Did you superintend them being boxed to be brought here?
A. No, sir.
—. You did not sort them out?
A. No, sir.
Q. Nor you did not see it done?
A. No, sir.
88 Q. And you did not know it was going to be done?
A. Yes; sir.
Q. How is that?
A. I went down on the same train with the party that went after them, and I went down after some other papers.
Q. What papers did you go for?
A. Papers relating to this business.
Q. What papers?
A. In regard to the settlement with Mr. Gould.
Q. Are those the only papers you went after?
A. Yes, sir.
Q. At whose request did you go for them?
A. Well, I came here as a witness, and I found on looking over the papers that I had not those and I went after them.
Q. And you went for them to assist Mr. Fitzgerald in this suit?
A. Yes, sir.
Q. And you are president of the company?
A. Yes, sir.
Q. And are charged with the management of its affairs?
A. Yes, sir; but just let me talk a little.
Q. You just answer my questions. Did you know just before this suit was brought that it was to be brought?
A. Mr. Fitzgerald had notified me time and again that unless he could get a settlement of this business he would begin suit.
Q. Did you not know this suit was to be brought before it was brought?
A. Nothing more than that.
Q. Had you not advised its being commenced?
A. No, sir.
Q. Was you not at Lincoln when it was brought?
A. Yes, sir; I was there.
Q. Your home is at Chariton, Iowa?
A. Yes, sir.
Q. And service was made on you at Lincoln?
A. Yes, sir.
89 Q. Did you go there for that purpose?
A. No, sir.

Q. Did you not know that suit was to be brought when it was brought and when you went to Lincoln?

A. No, sir; I did not know it was. Mr. Fitzgerald telegraphed for me to go, and I went there.

Q. Did you not go to the office of Mr. Fitzgerald and consult with them at the time they were getting up the papers to commence this action?

A. I consulted with them in regard to it.

Q. Was you not in Mr. Marquett's office assisting and advising with him in getting up this suit?

A. I was in his office then.

Q. And for that purpose?

A. No, sir.

Q. You have testified there was some consideration for the making of these notes and drafts.

A. Yes, sir.

Q. Did this indebtedness exist in the fall of 1887 for which these notes were given?

A. A portion of it.

Q. Did not you and Mr. Fitzgerald, at a meeting of the company in the fall of 1887, vote for and receive a one hundred per cent. dividend out of the assets of this company?

A. No, sir.

Q. Did you not vote for it?

Objected to as incompetent. Sustained, and — excepts.

Q. You say you were in Mr. Marquett's office at the time this suit was being talked up?

A. Yes, sir.

Q. And since then you have aided Mr. Fitzgerald in its prosecution?

A. I have aided him this far: Being one of the construction company, I have been interested in seeing its rightful debts paid.

90 Q. And still you were the supervising officer of the company and bound to protect it?

A. Yes, sir; and that is what I have been doing all the time.

Q. These vouchers which you have introduced here—were they made at the time they purported to have been made?

A. I presume so.

Q. When did you first see that paper, voucher 5186?

A. I cannot tell you the date. They were made out and they were handed to me for approval.

Q. Did you make that paper after the time of the bringing of this suit?

A. No; before.

Q. How long before?

A. I cannot tell you. I approved a large number of vouchers, and I cannot tell you the date.

Q. Did you approve it about the time this suit was instituted?

A. This voucher was made out the first of May, 1888.

Q. When was that delivered to Mr. Fitzgerald?
A. You — better ask the auditor.
Q. I am asking you. Do you know when it was delivered to Mr. Fitzgerald?
A. No, sir.
Q. Has it ever been delivered to him?
A. Yes, sir; I suppose so, but I would not swear to it.
Q. When did you last see this voucher before it was presented here in court?
A. When I signed it.
Q. To whom did you deliver it then?
A. To the auditor.
Q. Who is he?
A. Mr. Lamb.
Q. Is he here?
A. Yes, sir.
Q. And you have never seen it since, have you?
91 A. Not that I recollect of.
Q. Were all these vouchers of Mr. Fitzgerald signed at the same time?
A. I think they were.
Q. They were all numbered from 5186, 5187, 5188, 5189, 5190, and 5191. Were they all signed in contemplation of this suit?
A. No, sir.
Q. Why did you not sign the voucher for $1,515.00 at the time the articles were delivered in 1886?
A. Because he did not present his bill.
Q. When did he present his bill?
A. I suppose at the time the voucher is made out.
Q. And the voucher is made out in May, 1888?
A. Yes, sir.
Q. And the articles were delivered in 1886?
A. Yes, sir.
Q. Have you anything on your books to show the delivery of these articles previous to the time this voucher was made out?
A. Well, what do you mean by that?
Q. Have you any record to show the existence of this claim excepting the voucher—this one for $1,515.00?
A. We are not in the habit of putting anything on the books till the voucher is made out.
Q. Did you not make a statement on the 5th day of February, 1887, in which you stated that you had paid out and advanced certain amounts, and that Mr. Fitzgerald had paid out in the same way some $62,000.00?
A. Yes, sir; but that don't necessarily state all the amounts.
Q. Was not that done for the purpose of securing credit on your stock account?
A. Yes, sir.
Q. Did you not at the same time give it in on a balance due on your stock account?
A. Yes, sir.

Q. How did you happen to omit from that statement this item?

A. As I stated before, the bill was not presented at that time.

92 Q. Did not Mr. Fitzgerald get together all the accounts he had at that time for the purpose of reducing his stock account?

A. I do not know.

Q. When did you first hear of this account?

A. When he sent the tools down there, in 1886.

Q. But no record was kept of it?

A. We had no record of it till he made out this bill for it.

Q. And he did not make out his bill for it till this controversy arose?

A. I think he made it out before that.

Q. Do you have any knowledge of the date he made it out?

A. I cannot give you that date.

Q. Is it not a fact that after this controversy arose you commenced to make out all these vouchers?

A. No, sir.

Q. And were not they all approved the same day?

A. That may be.

Q. And left on file with the auditor?

A. Most of those vouchers were made out a long time previous and were in our office at St. Louis, and as we had no funds on hand they were left in that shape, and we refused to pay Mr. Fitzgerald on account of want of funds.

Q. Are these vouchers numbered in the order — which they were made out?

A. I do not know anything about that.

Q. You do not?

A. No, sir.

Q. You have no knowledge on that subject. Here is a voucher for expenses during the year 1886 in connection with the Denver, Memphis & Atlanta railroad. When was that bill presented?

A. That I cannot tell you. Mr. Fitzgerald is very negligent in making out his accounts and lets them run for a long time. I knew personally of a great deal of it and certified to its being cor-

93 rect the same as I would do for myself.

Q. I notice here one voucher which appears to be made (5186) out May 1st, 1888, and 5187 is made out January 1st, 1888. Will you tell the jury whether any other vouchers were made out between those two?

A. There has been no money paid to Mr. Fitzgerald for service.

Q. I want to know about these vouchers. One appears to be made out May 1st, 1887, No. 5186, and the other on January 1st, 1888, No. 5187. Were these two vouchers made out at the same time?

A. I don't know anything about the auditor's voucher numbers nor his accounts, either.

Q. What I want you to explain is, were there any other vouchers drawn on your business between January 1st, 1883, and May 1st, 1888?

A. I do not know anything about the auditor's business.

Q. Has the auditor done anything on his books since this litigation began?

A. That I cannot tell you. I had nothing to do with keeping the books.

Q. Is is not a fact that all these vouchers were made out in contemplation of this suit?

A. No, sir.

Q. It is not a fact?

A. No, sir.

Q. Were they made out subsequent to the commencement of the suit—any of them?

A. Not that I know of.

Q. If they had been made out subsequent to that time you would know it?

A. I do not recollect when the suit was begun.

Q. Have any of these vouchers you have testified to been made out since January 1st, 1889.

A. We did a large amount of business, and as fast as we got to it the vouchers were made out for it, but what time they were made I cannot say.

94 Q. Were any of these vouchers made out since the institution of this suit?

A. I cannot say, but I think not.

Q. If so, would you be likely to know it?

A. I think so.

Q. Do you say there were not any?

A. I think not.

Adjourned until June 21st, 1889.

Q. Are you interested in the Chariton National Bank?

A. Yes, sir.

Q. Are you an officer of that bank?

A. Yes, sir.

Q. What position?

A. President.

Q. You were president of that bank at the time that these several notes and drafts were drawn?

A. Yes, sir.

Q. Were you interested in the Lincoln National Bank?

A. No, sir.

Q. Were you in Lincoln at the time that note was drawn?

A. No; I think not.

Q. There is a note dated July 1st, 1888, Lincoln, Nebraska, for $5,002.80. Were you in the city of Lincoln at that time, when that note was executed payable to the First National Bank of Lincoln, Nebraska?

A. I think not.

Q. Do you know whether Fitzgerald is interested in that bank?

A. I understood that he was.

Q. As an officer?

A. Yes, sir.
Q. What officer?
A. President.
Q. Did the Fitzgerald & Mallory Construction Company have any business transactions in Nebraska at any time in the prosecution of any work?
A. They did no work in Nebraska.
Q. Had they any office in this State?
A. No, sir.

Q. At the time that you went there, when this suit was
95 brought, was the suit brought before or after you got there?
A. I cannot recollect that.

Q. You went there in obedience to a telegram?
A. Yes, sir.
Q. How many did you receive?
A. The telegrams passed frequently between Mr. Fitzgerald and myself.
Q. He telegraphed you to come there?
A. Yes, sir.
Q. When you got there you were served with a summons?
A. Yes, sir.
Q. How long after you got there before you were served?
A. The same day.
Q. Do you know of any other note that you executed as president of this company after this that you have offered in evidence?
A. Yes—that is, I know that notes were executed.
Q. By you?
A. Yes, sir.
Q. When?
A. I cannot tell you that. The notes were executed and paid off.
Q. Where?
A. At different times during the construction of the road.
Q. How many?
A. I cannot tell you. The books show that.
Q. Do the books show all the notes that were executed for the benefit of the company?
A. I think so.
Q. Your bills-payable account show that?
A. I think they ought to.
Q. All notes that were executed for the benefit of the company are fully disclosed in the books?
A. I presume so.
Q. All those notes that you executed you reported and they are recorded in the books?
A. I think so.
Q. If they were not reported and recorded in the books the company did not get the benefit of them?

96 A. No; not necessarily; I didn't keep the books.

Q. They were kept under your control and supervision at Chariton, Iowa?
A. No, sir.

Q. Where?

A. At the headquarters of the company; that is where we were doing business.

Q. Mr. Couch was auditor at one time?

A. Yes, sir.

Q. Up to what time?

A. In the latter part of the year 1888.

Q. Who succeeded him?

A. Mr. Lamb.

Q. Do you know for what this $5,002.80 note was given?

A. Yes, sir.

Q. For what?

A. After we moved our office we were at Pueblo, Colorado. When we completed the work there, for the purpose of economizing we moved the office to St. Louis and had a large amount of business to settle with the Missouri Pacific Railway Company, and we moved our office there, and after we got there there was no funds in the treasury and they found it necessary to provide means to pay for our materials and labor contracts, etc., and we had a great many small bills, for which we have vouchers, and it was necessary to have some money, and I directed the auditor or cashier to go to the bank at St. Louis and borrow $5,000.00 and he did so with the expectation that before it came due we would have funds in the treasury to pay it, and when it came due we did not and the bank would not renew our note on account of the general discredit of the company, and it had to be taken up, and I notified Mr. Fitzgerald and he directed it to be sent to the bank at Lincoln. It was sent there and that bank paid it and took up the St. Louis note.

Q. That is the bank of which he is president?

A. Yes, sir.

Q. Did you ever report that note of July 31st to the board
97 of directors?

A. No, sir.

Q. Did they have notice of any specific note executed by you or Mr. Lamb that Mr. Fitzgerald had endorsed?

A. No; the directors had nothing to do with that. They had no occasion for that.

Q. They had no notice of these notes?

A. No; I did not have to make any report.

Q. You did not tell them anything about these notes?

A. No, sir.

Q. The board in its individual capacity did not know anything about those notes flying around that you had executed?

A. They knew that we had notes out.

Q. Did they know about those notes? I understand you to say they did not.

A. No; I do not think there is.

—. How many notes did you have executed of which the board of directors had notice—that is, the specific notes that they had notice of to be executed *or* afterwards?

A. I cannot tell you that.

Q. Can you tell these gentlemen of any note that you ever executed that the board of directors had any notice of?

A. It was not expected that I should give them any notice.

Q. The question is, Can you mention any other note that they had notice of that you and Mr. Lamb had executed?

A. I do not recollect of any.

Q. It was understood, was not it, that the gentlemen in New York were to look after the finances of this company—provide the funds?

A. Yes, sir.

Q. The financial agents of this company were the men in New York, and it was understood so from the beginning, was not it?

—. ——.

Q. After a time they got control of the company?

98 A. No, sir.

Q. What time was it?

A. After they had turned it over to the directors.

Q. That was in about May, 1886?

A. No; it was in November.

Q. You and Fizgerald, then, understood at that time, did you not, that the financial part of this enterprise was to be managed in New York.

A. Yes, sir.

Q. Those gentlemen agreed to furnish the funds?

A. They agreed to, but did not do it.

Q. It was understood that they were to have control of that matter between you and Fitzgerald?

A. Yes; they agreed to furnish the money.

Q. They agreed with you and Fitzgerald to furnish the money?

A. Yes, sir.

Q. And did furnish some four, five, or six millions of dollars?

A. No, sir.

Q. How much did they furnish?

A. I will have to refer you to the books.

Q. I understood you to say that this work cost about $7,000,000?

A. Yes, sir.

Q. There was furnished at that end of the line about what proportion of that $7,000,000.00?

A. From the proceeds of the bonds they furnished the greater proportion of it.

Q. About $6,500,000.00?

A. They furnished what was lacking to pay off our debts.

Q. All the money that was used in the prosecution of this enterprise substantially came from New York?

A. I do not know what you mean by that.

Q. They managed to raise the money in New York and

99 you got your money by drafts drawn on Mr. Cross?

A. Mr. Fitzgerald and I paid up our subscriptions. We arranged for that, our proportion of the stock, and they agreed to negotiate the bonds, and they failed to do it.

Q. Some $50,000.00 odd of your subscription was paid up by what had occurred previous to the incorporation of the company?

A. No, sir.

Q. How was it paid?

A. By furnishing money during the progress of the work and paying it in.

Q. Previous to the incorporation of the company?

A. No, sir.

Q. Mr. Fitzgerald, previous to that time?

A. A part of it.

Q. At the time that you made the report to the board of directors, in February, 1887, you wanted to get credit, then, on your stock subscriptions?

A. Yes, sir.

Q. Up to that time had you paid anything on it?

A. The books show that I had. My report was received and accepted.

Q. Do you remember the circumstances of a resolution being passed authorizing the borrowing of $3,000,00. Do remember of having heard of this resolution being passed March 25th, 1887: Resolved, That, inasmuch *that* John Fitzgerald and S. H. Mallory are unable to advance their share of the funds required by the construction company, the treasurer be, and is hereby, authorized to borrow the sum of $3,000.00 on a note signed by himself as treasurer—do you remember that?

A. No, sir.

Q. When did you first hear of that?

A. That is the first time I ever heard of it.

Q. That was March 25th, 1887. I will ask you if you were not present at the meeting of the board of directors—state if you were not present at a subsequent meeting of the board of directors,
100 when the minutes of that meeting were read and approved.

—. ——.

Q. You were not?

A. No, sir. I would like to have those dates, if you please.

Q. I gave you the date, March 25th, 1887. Was you at the annual meeting of the stockholders at Chariton, Iowa, on the 20th day of April, 1887?

A. No, sir.

Q. You were not there?

A. No, sir.

Q. Who represented you at that meeting?

A. The secretary, Mr. King, I think.

Q. He had your proxy?

A. I sent it there. I think it was sent in blank, probably. I do not recollect about that. I was on the work at that time.

Q. Do you know of such a note being given for $300,000.00?

A. No; there never was such a note given.

Q. There was not?

A. No, sir.

Q. Do you know of you giving your note individually, you and Mr. Fitzgerald, to Mr. Gould?

A. Yes, sir.

Q. For how much each?

A. It was a joint note for $150,000.00.

Q. What was done with the proceeds of that note?

A. It was credited up to us on our stock.

Q. And the money used in the construction, was not it?

A. Yes, sir.

Q. And all the stock was paid up?

A. Yes, sir.

Q. 100c. paid on the dollar of that million five hundred thousand dollars?

A. Yes, sir.

Q. And that money was used in the construction?

A. Yes, sir.

Q. Do you know whether any member of the board of directors except yourself and Mr. Fitzgerald knew or ever knew anything about what was done with the proceeds of those various notes?

Objected to.

101 Q. Do you know whether any member of the board of directors, excepting you and Mr. Fitzgerald, knew what was done with the proceeds of those several notes that were sued on in this action?

A. It was reported to them that it would take $120,000.00 to pay up the obligations of the company before these notes were executed, and I drew on them for $40,000.00, which was refused.

Q. Before the notes were executed you reported $120,000.00 of obligations?

A. Yes, sir.

Q. Did they have any notice from any report that you ever made that these notes were executed to pay the liabilities of the company—this identical notice?

A. They had general notice; yes.

Q. That these identical notes were executed for that purpose?

A. That we issued notes. I do not know that we stated to whom.

Q. You made a report in writing?

A. Yes, sir.

Q. Did you in any report that you ever made in writing advise the board of directors that you had ever executed a note in the name of that company?

A. Yes, sir.

Q. In the report that you made in writing?

A. No; in letters to them.

Q. Did you not make a report to them about the 17th day of July, 1888?

A. I think about that time; yes, sir.

Q. Did you in that report mention the fact that you had executed any of those notes?

A. I don't know whether I referred to that or whether that report was in regard to that; the report will show for itself.

Q. I understood you to say a few moments ago that none of the members of the board of directors, so far as you had any notice that those notes were outstanding or that the proceeds were
102 used for the benefit of the company—those identical notes——

A. The board of directors in New York paid no attention at all to the business of the company. I was expected to carry it on and I notified them that we were out of money, and that if they did not furnish the money I would have to execute notes.

Q. When did you give them that notice?

A. I would not say that I would execute notes, but that we needed the money.

Q. Did you have a verbal or written—did you ever verbally or in writing tell them that you would have to execute notes?

A. Yes; I think so.

Q. When and where?

A. Mr. Fitzgerald and I had endorsed them and were suffering in consequence of that.

Q. When was that?

A. I can furnish the list.

Q. Do you remember an interview that you had in New York in which Russell Sage was present in which you spoke of notes outstanding and possibly Mr. Fitzgerald had endorsed them and they said that that was your lookout—that you had no authority to do anything of that kind?

A. No, sir.

Q. You executed notes on Winfield, you say.

A. We had our headquarters there with him. They executed some notes.

Q. Did you in any report that you ever made as the executive officer of this company advise any member of the board of directors of the existence of those identical notes?

A. They knew of the existence of notes to a certain amount.

Q. But not these notes?

A. No—that is, I do not know that I scheduled them. I may have done so. It may be possible I did.

Q. Mr. King was secretary, was not he?

A. Yes, sir.

103 Q. Is he a relative of yours?

A. No, sir.

Q. How long has he been secretary?

A. He was secretary at the organization.

Q. And has been since?

A. Yes, sir.

Q. He lives at Chariton, Iowa?

A. Yes, sir.

Q. Does he know anything about these notes?

A. No; he was nominally secretary of the company. He had nothing to do with the operations of the road.

Q. He had no notice of any of these transactions?

A. No, sir.

Q. At the time that you were in New York, when you spoke about these notes, did you know that there were some notes executed in New York by the treasurer to Morton, Bliss & Co.?

A. I never executed any myself.

Q. You knew that there were some notes outstanding in New York?

A. No, sir.

Q. Did you ever hear of them?

A. No; nobody had any authority to issue any notes but myself.

Q. Where did you get your authority?

A. From the articles of incorporation and my position as president of the company?

Q. That is the only authority you had?

A. Yes, sir.

Q. You do not claim that you had any other authority?

A. No, sir.

Q. Mr. Fitzgerald knew that as well as you knew it?

A. I don't know what he knew.

Q. He knew all about the transaction?

A. He did not pay any attention to that part of it.

Q. He was one of the incorporators?

A. Yes, sir.

Q. He was present at the organization?

A. Yes, sir.

Q. You had various meetings of the stockholders and board
104 of directors?

A. At some of them; yes, sir.

Q. He was at various of those meetings?

A. Some; yes, sir.

Q. Were you present at the meeting in July 17th, 1888, in New York city—at the meeting of the board of directors?

A. Yes, sir.

Q. Do you remember of a resolution being offered authorizing the treasurer to negotiate at once on the best terms possible a loan for the amount necessary for the immediate necessities of the company, which was seconded by Mr. Fitzgerald and voted down?

A. Yes, sir.

Q. That was the first attempt made by you to bring this matter to the attention of the board of directors, was not it?

A. No, sir.

Q. Why did you offer a resolution authorizing the treasurer to borrow money and execute notes when you state that under the terms of the charter you alone had that authority?

A. I do not hink I offered any such resolution.

Q. Did not you offer a resolution at the meeting of July 17th to the effect that 150 or $160,000.00 was necessary for the immediate necessities of the company, and that the board authorized the treasurer to negotiate at once on the best terms possible a loan to that amount?

A. That resolution was offered. I do not recollect whether I

offered it or not. It was for the purpose of paying our liabilities. Those things had accumulated, and Mr. Fitzgerald and I were carrying them, and we wanted to get relief and were willing to do almost anything. We could get no settlement with the Missouri Pacific Railway Company, and that matter was brought up there, and I recollect the resolution—but I do not recollect who offered it—that the treasurer be authorized to pay off that indebtedness, and it was voted down.

105 Q. The question that I ask you is if you had authority under the charter of this company to negotiate loans and execute notes, why did you bring this to the attention of the board of directors?

A. Because our credit had been ruined out here by their not furnishing the money to pay up.

Q. The first drafts that came back not paid were these drafts that you drew on February 23rd, 1888, were they not, referred to by Mr. Marquett, $40,000.00—they were the first drafts that had not been paid?

A. I cannot say as to that, but at previous times I had been notified not to draw.

Q. Had any drafts that you had drawn prior to that date come back protested?

A. I do not recollect.

Q. The work was completed in December, 1887?

A. Yes, sir.

Q. And so reported by you to the company?

A. No, sir; the work was not completed at that time. The contract was finished through to Pueblo.

Q. As a matter of fact, the only drafts that were ever drawn to your knowledge and were presented to Morton, Bliss & Co. or Mr. Cross were those that you refer to here?

A. No; I think the drafts before that time were returned and afterwards funds were raised and they were met.

Q. These specific drafts were drawn in March and February, 1888, appear to have been presented and either protested or returned?

A. Yes, sir.

Q. These are the drafts that are made before some of those notes that Mr. Fitzgerald sued on, are they not?

A. I suppose some of the proceeds of those drafts would be applied in the payment of those notes and other indebtedness of the company.

106 Q. The object of those drafts was to pay the notes that had been given to the Fitzgerald bank in Lincoln and your bank in Chariton, Iowa?

A. No; there had been no note given to his bank at that time.

Q. There was no indebtedness at that bank?

A. I do not think there was at that time.

Q. Take that note of July 30th, 1888; that is payable tot he bank of which you are president.

A. Yes, sir.

Q. When that came due how was it paid?
A. The note was signed by the bank over to Fitzgerald.
Q. How was it paid?
A. It was paid by renewal.
Q. That is the note sued on?
A. That is signed by Fitzgerald and I presume he gave his note at the bank in pursuance of it.
Q. How was it paid?
A. I think the bank holds his note.
Q. That, as a matter of fact, *it* has not been paid except by that note?
A. We considered it was paid.
Q. Isn't it a fact that because of your interest in that bank that this was endorsed to Fitzgerald for the purpose of suit, and that your bank holds his individual note?
A. No, sir.
Q. Is not that the case with all these notes?
A. No, sir.
Q. How much is that for?
A. $5,000.00, dated July 30th, 1888.
Q. As I understand you, this note was taken up and Mr. Fitzgerald's individual note put into the bank in place of this?
A. I think so. I have no knowledge of that myself, per-
107 sonally; that business was done between Mr. Fitzgerald and the bank. I am not competent to testify.
Q. Are you able to state to these gentlemen whether or not this note has ever been paid as a matter of fact except by Fitzgerald's individual note?
A. I do not know that it has.
Q. I will ask you if you are able to state as a matter of fact whether the note to the Bank of Lincoln has ever been paid except by his individual note?
A. I don't know anything about it.
Q. State if you do not know from conversations with Mr. Fitzgerald that it has not been paid.
A. No, sir.
Q. You never have heard that?
A. No, sir.
Q. You do not know of any arrangement that he has with the bank?
A. No, sir.
Q. You endorsed this note yourself, didn't you?
A. Yes; I had to, to borrow the money.
Q. How was it; was you present at the time that Mr. Cooker endorsed his name on the back?
A. No, sir.
Q. To whom was this note delivered after Mr. Fitzgerald put his note in the bank?
A. I do not know.
Q. Was it delivered to you?
A. No, sir.

Q. Who took it out of the bank?

A. I suppose that probably, on the request of Mr. Fitzgerald, it was mailed. I do not know anything about it personally.

Q. Did you mail it?

A. No, sir.

Q. Did you know it was mailed?

A. It got to Lincoln, I supposed. I do not know how it got there.

Q. Might he have been over to Chariton?

A. He might have been.

Q. What is your impression about it?

A. My impression would be that the bank called upon the
108 company for payment and he assumed it. It was turned over to Mr. Fitzgerald.

Q. Calling upon the company would be upon you, would it not?

A. Yes, sir.

Q. Then you, as president of the Chariton Bank, called upon yourself, as president of the Fitzgerald and Mallory Construction Company, to pay this note?

A. Yes, sir.

Q. And as president of the bank you said to your company, as president of the company, We won't pay it?

A. No, sir.

Q. That is what you thought, and then you caused it to be mailed to Mr. Fitzgerald?

A. No, sir.

Q. Did you direct anybody to mail it to Mr. Fitzgerald?

A. I do not know.

Q. Do you know that it was mailed?

A. I don't know anything about it.

Q. You do not know how this note was paid or how it got out of the bank?

A. No, sir.

Q. You have no knowledge on that subject?

A. No, sir.

Q. You do not know that Mr. Fitzgerald intended to assume it?

A. I understood something in regard to their turning over the note to him, and he would execute his note in place of it.

Q. You did not request him to do that, I understand you?

A. I do not think I did.

Q. Then he did it merely as a voluntary matter?

A. No; my business takes me away from Chariton. I could not personally. I had nothing to do personally with the management of the bank; it is in the hands of the cashier and vice-president and the directors there, and they go on and transact business and do a great deal of business without my knowledge, and for that reason I will say I know nothing about this.

Q. Mr. Fitzgerald is not on that note?

109 A. No; it seems not.

Q. He was not in any manner bound by it when it became due?

A. Not legally; I suppose not.

Q. He did not agree to pay it?
A. He agreed to be responsible for it.
Q. When did he agree to be responsible for it?
A. That was the general understanding.
Q. I understood you to say you knew nothing about this transaction.
A. Not about that particular transaction.
Q. He was under no legal obligations to pay this note, so far as you know. He put his note in the bank and this was mailed to him at Lincoln to bring suit on?
A. He became liable for that note.
Q. How did he become liable for that?
A. By giving his other note.
Q. And that note has not been paid?
A. I do not know about that.
Q. Do you know when it is due?
A. No, sir; he has got it, though.
Q. Then, as a matter of fact, this note has not been paid except in the way you stated.
A. I cannot tell.
Q. Here is a note for $15,290.00. I find a note here of July 25th, 1888, for 60 days, dated in New York. Were you in New York when that note was given?
A. Yes, sir.
Q. Was Mr. Fitzgerald there?
A. I do not recollect whether he was there at that time.
Q. He endorsed it, did not he?
A. The note was sent to him for endorsement and for-
110 warded to the bank if he was not there.
Q. You were there in New York when it was executed—July 25th, 1888?
A. No; I do not think I was there on that date
Q. I would infer from the meeting of the board of directors that you were there about that time?
A. I think I left before.
Q. I wish you would look and see if you have any memorandum.
A. No; I was not there at that time.
Q. Were you there on the 17th?
A. Yes, sir.
Q. This note was executed to take the place of another note that was given to this same bank?
A. It matured on the 25th. The note was dated in advance.
Q. At the time that you were in New York did you call attention of the board of directors to this identical note that you expected to execute there?
A. I called their attention to the fact that we had a note due for payment of these contractors—that we would have to renew or pay. It was the same thing.
Q. Did you tell any other member of the board of directors that there was a note due to the bank in New York that required you in a few days to execute another note?

A. No, sir; that was in Chicago.
Q. I understand from the date here is a New York note?
A. It happened to be dated in New York.
Q. Who is J. J. T. Odell?
A. Vice-president of the National Bank of Chicago.
Q. That was drawn in New York?
A. Yes, sir.
Q. When you drew that note was you in the office of the company?
A. No, sir.
Q. Where?
A. At the hotel.
111 Q. Did you tell any of the members of the company that you were going to do that?
A. I told them we would have to do it if they did not give us some help.
Q. Did any member of this company outside of you and Mr. Fitzgerald know that you sat down in the hotel in New York to draw a note for $15,290.00?
A. I do not suppose that they did, unless they were there and saw it; they knew that we had to do it.
Q. Who did you tell?
A. Mr. Sage, Mr. Dillon, and Mr. Gross.
Q. About that identical note?
A. Of this particular circumstance, yes.
Q. Have you not testified that you did not tell any of them about any identical and specific note?
A. I say that still, but all these notes that we had endorsed I did not have to tell them any note.
Q. Coming back to these vouchers, I will ask you to examine these vouchers, the handwriting in the body of the —, together with this one. You are familiar with handwritings and do a great deal with them. In your opinion I ask you if all those vouchers were not written at the same time, with the same pen and the same ink, the body of them?
A. No, sir.
Q. They were not?
A. No, sir; those two were written by different parties.
Q. Whose handwriting is the body of that?
A. I would say that was Mr. Fitzgerald's clerk.
Q. Whose handwriting is that?
A. That is one of our men in the office; I can't tell which one.
Q. Whose handwriting is that?
A. That looks like Mr. Fitzgerald's clerk, and this is one that was made out in the office, and this one.
112 Q. In the office?
A. Yes, sir.
Q. And this one?
A. Yes, sir.
Q. And this one?
A. Yes, sir.

Q. Were those vouchers made at the same time—these four?
A. I can't tell you.
Q. The note dated April 28th, 1888, payable to the order of S. H. Mallory, drawn by C. M. Lamb, auditor, and accepted, payable at the First National Bank of Chariton, Iowa, by S. H. Mallory, president. Now, I will ask you if that note was paid to the Chariton Bank, at Iowa, in the same manner as the other note, by putting in Fitzgerald's note.
A. I do not know.
Q. Do you know anything about that?
A. No, sir. I know that the note is legitimate.
Q. Do you know whether it has been paid or not?
A. No, sir.
Q. Do you know whether Mr. Fitzgerald has ever paid it or not?
A. No, sir.
Q. Was it ever paid by your bank, the Chariton Bank?
A. How would they pay it?
Q. It is accepted, payable at the First National Bank of Chariton, Iowa.
A. I know that the company got credit for that money.
Q. Where?
A. In St. Louis.
Q. Who paid it?
A. It appears there is a credit on it of three thousand and some dollars. It was paid to the bank.
Q. Did they know it at that time?
A. Yes, sir.
Q. How did Mr. Fitzgerald pay the balance on it?
113 A. I do not know.
Q. Did you endorse it to the bank?
A. I did—that is, I endorsed it; went security for it.
Q. You do not know whether Fitzgerald ever paid the bank anything or not?
A. I do not.
Q. He was responsible on the paper?
A. He did not endorse it—not on that paper legally.

Redirect examination by Mr. MARQUETT:

Q. You may explain about this note that he has that you gave; how you came to give it for your stock. He asked you if you didn't give a note for your stock—whether you had paid up your stock?
A. The original capital stock of the company was a million dollars. After we got started the directors in New York—they had taken a controlling interest and wanted to increase to two millions, to which I objected, and finally consented with the understanding that we were to have a one-third interest. I finally consented that the stock be increased to a million and a half. We went up to Mr. Gould's house, and Mr. Gould—— .
Q. This note of the Chariton County Bank, the bank has no more claim against the construction company?
A. No; it has not.

Q. In reference to these vouchers of Fitzgerald's, is not it a fact that he presented no claims for his services or for his expenses until after the contract work was finished?

Objected to.

114 WILLIAM M. KENNEDY, sworn for the plaintiff, examined in chief by Mr. MARQUETT, testified as follows:

Q. Is this your name?
A. Yes, sir.
Q. State if you held possession in the Fitzgerald & Mallory Construction Company in February, 1888.
A. Yes; I was cashier and paymaster at that time.
Q. Is that your signature?
A. The endorsement on the face of the note; yes, sir.
Q. Accepted February 5th, 1888?
A. Yes, sir.
Q. To whom did you deliver those (referring to Exhibits B 1, B 2, and B 3)?
A. I delivered those to Bracy Brothers.
Q. Do you know who Bracey Brothers are?
A. Yes, sir.
Q. Had they been at work for the Fitzgerald & Mallory Construction Company?
A. Yes, sir.
Q. What had they been doing?
A. Laying track and building bridges.
Q. What were those delivered for?
A. For construction work.
Q. For payment for their work?
A. Yes, sir.
Q. Did those three checks pay them in full—was that a settlement?
A. I understood it was.
Q. You say you were cashier at that time?
A. Yes, sir.
Q. Was there any money in the treasury?
A. There was no money in my possession.
Q. And you did not pay the checks?
115 A. No; they were drawn on sixty days. I accepted them.

Cross-examined by Mr. WAGGENER:

Q. You were not the treasurer of the company?
A. No, sir.
Q. The treasurer was in New York?
A. Yes, sir.
Q. You would not know how much money he had?
A. No, sir.

CLAUD M. LAMB, sworn for the plaintiff, examined in chief by Mr. MARQUETT, testified as follows:

Q. Did you ever hold any position in the Fitzgerald & Mallory Construction Company?

A. Yes, sir.

Q. What position did you hold?

A. I was voucher clerk for a certain length of time, and latterly auditor of the company.

Q. Were you ever cashier?

A. When the services of the cashier was dispensed with in April, 1888, I assumed the duties of cashier.

Q. Do you know what this note was given for?

A. I believe that note was given as a renewal of a note given to the Chariton Bank in January, 1888.

Q. What note is that (handing witness a note dated July 30th, 1888)? Do you know what that note was given for in January?

A. That is a renewal; it was for funds advanced by the Chariton Bank to the construction company.

Q. Do you know for what these funds were used by the construction company?

A. No; I could not say just what these funds were used for, because I did not handle the cash at that time.

Q. There are several notes here sued on. Do you know whether—for instance, you say this note was given for another note. Here are some checks; were those graded as bills payable on the books
116 of the company?

A. Those three, they are.

Q. And the notes to which this was given?

A. Yes, sir.

Q. Could you get the record to show where those different notes are carried on the books of the company?

A. Yes, sir.

Q. How would they appear there? Would they appear as the notes were without being renewed?

A. Yes, sir.

Q. Suppose you get the proper ledger that this indebtedness of notes are carried on (handing witness book). On page 55—what is that (referring to $5,000.00 note, with protest fees of $2.80 attached)?

A. This is count one, $5,002.80.

Q. Where is it represented?

A. On the entry of April 30th.

Q. What page of the journal?

A. Page 26 in the cash book—cash receipts.

Q. Anything on the journal?

A. No. It was a cash transaction. We received the cash on this note. This is a renewal note.

Q. What is that date?

A. April 30th.

Q. That is the only one that is renewed?

A. Yes, sir.
Q. What date—did this appear there?
A. Yes, sir.

The notes referred to are marked Exhibits "B 1," "B 2," and "B 3."

The plaintiff offers in evidence page 55 of the ledger. It is considered that such parts of the book as may be material to either side may be read.

Q. What ledger is this?
A. General ledger.
117 Q. Under what heading does that come?
A. It comes under the date of July 31st, 1888.
Q. Where does it appear there?
A. On page 422 of the journal, under the ten-thousand-dollar amount—that is, five thousand dollars of it.
Q. Do you know what became of the other $5,000.00?
A. I think the other was paid.
Mr. WAGGENER: What page of the journal is the last?
A. Page 422, $10,000.00.
Mr. MARQUETT: Do you know anything about that note?
A. Yes, sir.
Q. What was it given for?
A. That was in settlement for the bridge iron furnished by M. S. Carter, of St. Louis.
Q. To whom was it furnished?
A. The Fitzgerald and Mallory Construction Company.
Q. And that note was given in payment of that account?
A. Yes, sir.
Q. Is that your signature?
A. Yes, sir.
Q. What was that note given for?
A. That note was given to Mr. Mallory for funds advanced to the construction company to pay bills, the current expenses of the office, and for other work under construction, for which we had made drafts on Mallory at Chariton at the time in small amounts.
Q. To pay whose debts?
A. The debts of the construction company.
Q. The Fitzgerald & Mallory Construction Company?
A. Yes, sir.

118 Cross-examination by Mr. WAGGENER:

Q. Look at page 492 of the journal and see if $2,750.00 of that did not go to Mr. Mallory and $2,750.00 to Fitzgerald.
A. That is the way that entry appears on there.
Q. Whose handwriting is that?
A. That is mine.
Q. Where did you get the information from?
A. I got that from Mr. Mallory.
Q. Then, according to that, Mr. Fitzgerald got $2,750.00 of that sum and Mallory got $2,750.00?
A. Mr. Mallory has credit for $2,750.00, and so has John Fitz-

gerald, but they have not received it. That amount stands to their credit.

Q. They got it how?

A. They have not got it at all.

Q. Why did they get credit for it?

A. I received a memorandum from Mr. Mallory that $5,500.00 was paid on account of a note in Chicago.

Q. You do not know yourself what the consideration of that is, except what Mr. Mallory told you?

A. Nothing whatever.

Q. There are a number of vouchers here that I see you have audited. Take this voucher of $5,191.00. Did you audit that?

A. Yes, sir.

Q. When?

A. May 7th, 1888.

Q. Was that the time that your signature was put on there?

A. Yes; I would think so by the date of the voucher.

Q. Since the first of December, 1888, you have posted up those books, have you not?

A. No, sir.

Q. When did you do the last work on them?

A. I cannot say exactly without referring to the book.

119 Q. Have you done work on those books since they went into the hands of the receiver in Chariton?

A. No, sir.

Q. They went into the hands of the receiver on the 26th of April, did they not?

A. I believe so.

Q. Whose handwriting is that entry of April 30th, 1889?

A. That is mine.

Q. Was that made April 30th, 1889?

A. No, it has been made since April 30th, 1889.

Q. What time since?

A. I could not tell you.

Q. How many weeks ago?

A. It would be shortly after April 30th.

Q. If these books went into the hands of the receiver on the 26th of April, 1889, it was done since they went into his hands?

A. Yes, sir.

Q. How much was done since then?

A. That page.

Q. Was not several of those pages done since that time?

A. No, sir.

Q. None of this was done since April 30th?

A. Nothing since on that page.

Q. Under whose direction did you do that since April 30th?

A. I didn't have any direction from any one to do it.

Q. Did the receiver?

A. I have been appointed auditor of the receiver, and I try to keep things up.

Q. You occupy your position right along.

A. Yes, sir.
Q. And keep right to work at the books?
A. Yes, sir.
Q. You have a voucher record, have you not?
A. Yes, sir.
Q. I notice in this voucher record an entry of a voucher, $5,185.00. It was originally made out John Fitzgerald, services 1885 to 1886, $5,000.00. I see that has been scratched out and somebody else put in another. Do you know anything about that? Is that your handwriting?
120 A. Yes, sir.
Q. What did you do that for?
A. I do not recollect the transaction.
Q. Was there ever a voucher made out from that money from May 1st, 1885, to 1886?
A. Yes, sir.
Q. Where is it?
A. It is evidently cancelled, according to this.
Q. Under whose orders was it cancelled?
A. I could not say.
Q. When was that done?
A. Apparently October 12th.
Q. As a matter of fact, when was it done?
A. October 12th.
Q. What year?
A. 1888.
Q. You cancelled that entry. Would you cancel that except by order of Mr. Mallory or Mr. Fitzgerald or somebody?
A. If a voucher was not approved by the president I would be obliged to cancel the voucher.
Q. Would you put a voucher on record until it was recorded?
A. In some cases.
Q. Has there been any work done on this book since it went into the hands of a receiver?
A. I think not—yes; there has; these last three entries.
Q. Under whose directions was those three entries made after they went into the hands of a receiver?
A. I had no directions, no instructions regarding it whatever.
Q. When did you, as auditor, first hear of this expense account of Fitzgerald's?
A. I heard of that expense account in the spring of 1888, or, rather, the summer of 1888, when these vouchers first came
121 into the office in St. Louis.
Q. Did they all come in together?
A. I think not.
Q. Isn't it a fact that all those Fitzgerald vouchers were approved by you—all at the same time and with the same pen?
A. I think probably they were.
Q. Under whose directions did you approve them?
A. I approved them as auditor of the construction company.
Q. Under whose direction?

A. It didn't require any direction.
Q. Where have they been sent?
A. In the hands of the construction company until a certain time.
Q. Until what time?
A. I think October 12th.
Q. Then what was done with them?
A. Then, I believe, they were forwarded to Fitzgerald.
Q. By whom?
A. Myself.
Q. Did Mr. Fitzgerald have those vouchers in October, 1888?
A. I could not say just when they were forwarded to him.
Q. Were they forwarded to him in 1888?
A. I could not tell you that.
Q. Were they forwarded to him in 1887?
A. They could not have been.
Q. Were they forwarded to him in 1889?
A. I could not say.
Q. What is your best impression about it?
A. I could not tell you anything about it.
Q. Didn't you say a few moments ago in October?
A. I say they were entered in October.
Q. When were they forwarded?
A. I couldn't tell you.
Q. What is your best impression?
122 A. I have no idea whether they were forwarded then or later.
Q. Did you forward them yourself?
A. I think so.
Q. Did you keep a letter-press copy of the letter?
A. I think I did.
Q. Have you that here?
A. I do not know that they are here.
Q. Don't you know that an order was made requesting them to be produced—these letter books?
A. I think all the letter books are here, with the exception of the auditor's letter book.
Q. You have them all here except the one wanted?
A. Yes, sir.
Q. Did you go from here over to Chariton to get those papers?
A. Yes, sir.
Q. Who went with you?
A. No one with me.
Q. Who went on the same train with you—anybody that you know?
A. Yes, sir.
Q. Who?
A. Mr. Mallory.
Q. Who did go with you?
A. He was on the train.
Q. What made you say nobody went with you?
A. He didn't go with me.

Q. Did you ride in the same seat?
A. Yes, sir; part of the way?
Q. Who paid your fare?
A. I paid it myself.
Q. Who furnished the money?
A. I furnished it myself.
Q. Who bought the ticket, yourself?
A. Yes, sir.
Q. Did Mr. Mallory go to the office with you?
A. No, sir.
Q. Did he know what you brought back?
A. No, sir.
Q. Was he in the office while you were getting those papers?
A. No, sir.
Q. Did you bring those vouchers with you?
A. No, sir.
Q. Who brought those?
123 A. I did not bring them.
Q. Who brought them?
A. I do not know.
Q. When did you last see them over at Chariton?
A. I could tell by my letter book the date I sent them to Mr. Fitzgerald.
Q. At whose request?
A. I think Mr. Thayer.
Q. He is one of the officers of this company, too?
A. Yes, sir.
Q. Do you know that those vouchers were being prepared in anticipation of a suit?
A. I have heard that they were.
Q. Who told you that?
A. I don't recollect.
Q. Did Mr. Mallory tell you to get up those vouchers—that there would be a suit brought about it?
A. No, sir.
Q. Did Mr. Fitzgerald?
A. I did not think a suit was in anticipation when they were being prepared.
Q. Didn't you say a few moments ago—didn't you say that?
A. I didn't understand your question, if that was it.
Q. You heard that a suit was talked about?
A. Not when those vouchers were under consideration.
Q. When did you first hear that a suit was talked about?
A. I think about December—the latter part of the year.
Q. Long after these vouchers were made up?
A. Yes, sir.
Q. What did you say about a suit talked about when those vouchers were being gotten out?
A. I did not understand it.
Q. Everything was peace and quiet before; you didn't hear Mr. Mallory threaten a suit?

A. No, sir.
Q. You knew nothing about those notes being produced?
A. No notes were produced at that time, I think.
Q. Did you know about Fitzgerald paying any notes?
A. I don't think any were paid when those vouchers were made up.
124 Q. Those were made out in October?
A. No; in May.
Q. Do you know of Mr. Fitzgerald paying any notes out of the bank?
A. I know this, that the note that was discounted in St. Louis, on which John Fitzgerald and Mr. Mallory's endorsement was for $5,000.00, was protested in St. Louis and a demand was made for the money in St. Louis, and I informed the cashier that we had no funds, and he asked me what he should do with the note, and I instructed him to forward it to John Fitzgerald at Lincoln and the note would be taken care of.
Q. When you approve a voucher it goes into the voucher book and is carried into the account of the party?
A. He is credited with that much; yes, sir.
Q. So that, if I present a claim against your company and the president approved it, and it is put on your voucher book, it is carried to my credit?
A. It would be carried to the credit of audited voucher accounts. It would stand on our books under the head of audited vouchers, except in some cases where they are carried to personal account.
Q. Does your ledger show these audited vouchers?
A. Yes, sir.
Q. Does Fitzgerald's account show anything about it?
A. Mr. Fitzgerald's account in that ledger would not.
Q. Why up to what time does that audited voucher account come?
A. To the end of December, 1888.
Q Will you turn to the audited voucher account for $396.65 on that ledger right there?
A. It would be included in one of these larger amounts.
Q. Will you turn to the audited voucher, $3,328?
A. It would be included in this amount of $28,185.00.
125 Q. When were those endorsements made?
A. I would say shortly after January, October, November, or December.
Q. That would be made in January, 1889, for those months?
A. I would think so.
Q. If this $3,300.00 here appears in this $2,600, then this entry was made in January, 1889?
A. Yes, sir.
Q. Do you say those dates appear there?
A. Yes, sir.
Q. Credit, then, is made out in May?
A. Yes; 1889.
Q. It don't get on your books until January, 1889?

A. No; it was entered on our books in October, 1888.

Q. Will you please explain to the jury why you would audit a voucher in May, 1888, and not get on your voucher book until October, 1888, and on your ledger until January, 1889?

A. I cannot tell just the reason. From the fact that one of those vouchers were cancelled it would appear that they were not approved by the president, and consequently could not go into the books at all. At the time that these vouchers were made out we had our office in St. Louis, and Mr. Mallory was not there to approve them, and when we moved our office to Chariton I had our vouchers approved and they went on our books.

Q. What does that mean?

A. The month they were recorded in the voucher record.

Q. Then what was done with them?

A. They were filed.

Q. Where did you make that book from?

A. Our journal.

Q. Give me the page of the journal upon which appears that entry of $26,000 to make up these amounts.

A. Page 490; $26,810.85.

Q. Will you look at that and point out the item of $3,333?

126 A. If you will refer to those books you will find that those vouchers were charged to the different business of the road under construction.

Q. Here is a voucher, 1515, for goods shipped June, 1888. When did you first hear of that?

A. I first heard of that when Mr. Cox was out here.

Q. There is nothing on your books to show anything about that, to tell that that voucher was approved?

A. No, sir.

Q. Your material account does not show it?

A. It would be included in the material account.

Q. This voucher was not recorded until October, 1886?

A. No, sir.

Q. And you have no idea whether you sent this voucher to Fitzgerald 1888 or winter of 1889?

A. I have not.

Q. Would you probably have sent this voucher away at all after you had recorded them in your ledger?

A. Yes, I would; that would not affect the case at all. They would be in our voucher record, and that would be what I would work from.

Q. You were working from the voucher record?

—. ——.

Redirect examination by Mr. MARQUETT:

Q. What does that show (referring to a journal)? What is the meaning of that entry?

A. For amount paid the Union National Bank of Chicago December 15th, 1888, being the $5,000.00 on note due that date. The

balance, $10,000.00 new note given S. H. Mallory, is credited with $2,750.00.

Q. That would be about the amount due on that note at that time?

A. Yes, sir.

Q. Interest and all?

A. Yes, sir.

Q. They pay $5,500.00 there; isn't that it?

A. That is the way I understand it.

Q. Was not that for a payment on this note?

127 A. That is what I understood.

Q. Pay on that note made?

A. Yes, sir.

Q. According to that there, one paid half and the other paid half. Is that it?

A. Yes, sir.

Q. Did you credit the company with that on the ledger? Did you give the company credit—that is, the bills payable? Did you credit the $5,500.00?

A. Yes, sir.

Q. The bills payable got credit for that?

A. I charged bills payable with it.

Q. You charged bills payable with that?

A. Yes; we reduced our bills-payable account $5,500.00.

Q. If a note like this were given, that would have paid up the $15,000.00 note, would not it?

A. Yes; if that note was paid it would wipe that transaction out.

The plaintiff offers the note in evidence, being for $10,000.00, dated December 14th, 1888.

Cross-examination by Mr. WAGGENER:

Q. Did you ever see that note before (referring to a note)?

A. Yes, sir.

Q. That is a note signed by John Fitzgerald and S. H. Mallory for $10,000. Does the name of Fitzgerald and Mallory Construction Company appear there?

A. Yes, sir.

Q. Does that appear on your books?

A. No, sir.

Q. This is the note that was taken up with this $5,000.00?

A. I do not know.

Q. There is a credit of $5,000.00 on there?

A. Yes, sir.

Q. State if anywhere in your books there is a reference made to that $10,000.00 note of December 15th, 1888.

A. No, sir.

128 Redirect examination by Mr. MARQUETT:

—. State what you have heard about how this other note was paid. Isn't there a reference made there?

A. Yes, sir.
Q. Read that.
A. For $5,000, on note due that date, and balance, $10,000; new note given.
Q. $5,000.00 of the funds of the company went to pay this note, for which Mallory & Fitzgerald were credited?
A. No; not the funds of the company. Mallory & Fitzgerald got credit for $2,750.
Q. As being paid that much?
A. Not on this note; on the $15,000.00 note.
Mr. MARQUETT: In Chicago?
A. Yes, sir.
Q. Do you know of this company having a note in Chicago?
A. Yes; the $15,000 note. I only know of one note.

D. J. THAYER, sworn for the plaintiff, examined in chief by Mr. MARQUETT, testified as follows:

I reside in Chariton, Iowa.
Q. Are you the Mr. Thayer that signed that record there?
A. Yes, sir.
Q. You are the person that was referred to in that?
A. I believe I am.
Q. Are you the person that put Mr. Mallory's name to that?
A. I am.
Q. Do you know what those drafts were given for?
A. Yes, sir.
Q. State what they were given for.
A. The Fitzgerald & Mallory Construction Company made a contract after that under the firm name of Rush Brothers. They
129 let the contract. They made two contracts, one for laying track from McKearn, in Kansas, which the construction company were building at that time, to the west line of the State of Kansas or the east line of Colorado. When the contract reached the east line of Colorado we made a second contract through to Pueblo. When they laid that track it was accepted by the construction company with a few reservations, deductions on account of some work, *that* the construction work, that the company had to do for them, and when their account was made up—I think in the month of January or first of February—they came and made a final settlement and presented those personally to our office in St. Louis and insisted that their account should be paid; that they had waited very long, to their detriment; that they were in financial straights; that they had borrowed money on account of money which the construction company were owing them and which were past due to them, and which the officers of the construction company could not —, but admit that it was necessary to settle up their accounts. The auditor of the construction company made out a statement of the balance due them by the construction company, which amounted to $15,290.24. I think the amount of those three drafts. We represented to them that we had no money, and they asked us

to give them paper. I represented the matter to the president of the construction company as to the urgency of paying them, and he instructed me to issue checks for that amount and I issued three checks.

Q. These are the three?

A. Yes. They were accepted by the cashier of the construction company; three checks.

Q. Were they delivered to the Racy Brothers, or don't you know?

A. My impression is that they were delivered either by me or Mr. Kennedy to our cashier at that time. I would not state which positively.

130 Q. Do you know anything about the execution of that note (referring to the $15,000.00 note)? Were you present when that note was given?

A. It is in my handwriting.

Q. State how it came to be given and how Mallory and Fitzgerald came to endorse it.

A. The Union National Bank of Chicago presented those three checks, with the cashier's acceptance, to the construction company for payment. The construction company had no funds. They insisted on payment, and Fitzgerald and Mallory personally used their influence with Odell, vice-president of the Union National Bank, to have him have his bank accept this note and take up these three drafts for the purpose of gaining more time for settlement with the construction company.

Q. Were they willing to accept the note of the construction comp. for those checks?

A. I was informed that they would not.

Q. Was that note again renewed, or don't you know anything about that?

A. Yes; it was again renewed.

Exhibits B 1, B 2, and B 3 were shown to the witness and the following question asked:

Q. Were you with the Fitzgerald and Mallory before the corporation? Had you anyting to do with the work on this line of railroad—that is, the work after it was finished by this construction company for the Denver, Memphis and Atlantic Railroad Company? Had you anything to do before the organization of the construction company?

A. Yes, sir.

Q. What was done before the organization of the company?

Objected to as immaterial and incompetent.

131 Q. What was done before the organization of the construction company, and done in view of the organization?

Objected to as irrelevant, immaterial; overruled; excepted.

A. Mr. Fitzgerald had become interested in an enterprise started in Kansas, called the Atlantic railway, and done some work there and helped the enterprise, and Mr. Mallory was asked to take a share

with him in the enterprise, to go in as a partner to aid him in carrying it through, and under that partnership—under the contract between Fitzgerald and Mallory and the Denver and Atlantic Railway Company—Fitzgerald and Mallory built some 60 miles or more, worked up a good deal of local aid and helped to secure a large amount of the charter to the road, incurred the expenses of those things, and other matters which would take the attention of the court too long to specify.

Q. Was this work done in view of organizing a construction company?

Objected to on the ground that there is no allegation of that kind in the petition.

The discussion branched off into the time that the president should receive his salary, and it was decided to be from the time the corporation was organized, and Mr. Marquett taking the ground that it should go back to the beginning of the work; to which the plaintiff excepts.

The plaintiff asks permission to prove what the services of Mr. Fitzgerald were worth before the organization of the company.

Objected to; sustained; exception.

Q. Do you know what work Mr. Fitzgerald done; what it was worth in the grading of this 60 miles that you speak of previous to the corporation?

Objected to as immaterial.

Q. Do you know what kind of work he did prior to 1885?

132 Objected to.

Q. What was the nature of the work that was done?

Objected to; sustained; exception.

Q. Do you know who got the pay for the grading of this 60 miles that you say was done before?

Objected to; sustained; exception.

Q. Do you know what the services of Fitzgerald was worth in this grading work done in 1885 and up until May 1st, 1886, in getting this municipal aid and in going down and getting good parties in order to make the bonds salable and all he done during 1885 and up to 1886?

Objected to; sustained; exception.

Q. Do you know anything about any understanding with this company that Mr. Fitzgerald had about paying for this work done prior to May, 1886?

Objected to; overruled; exception.

Q. Do you know anything about the arrangement by which all persons who have done any work on there was to be paid by the construction company—work done before on this 60 miles of grading—before 1886?

A. I know what Mr. Mallory told me after the arrangement.

Objected to; sustained; exception.

Q. Do you know what Mr. Fitzgerald did there from April until November 4th—what he did for the construction company?

Objected to; overruled; exception.

Q. Do you know anything about Fitzgerald being employed by the president of this company to do any work between April 4th and November 4th, 1886?

A. I know that Mr. Fitzgerald was appointed or elected vice-president and treasurer of the Fitzgerald & Mallory Construction Company when it was organized; that he spent the greater
133 part of his personal times during those months down on the work and that I had occasion to consult with him, and in my position there which I held I took occasion to consult with him frequently and bring to his attention the interest of the railway company towards the construction company and agree with him on the mode of procedure in certain cases. I know that he furnished money at that time because I drew drafts on him.

Q. What did he do with the construction at the work—what did he do?

A. I looked for Mr. Fitzgerald.

Q. What was your position?

A. I was chief engineer and general manager of the Denver, Memphis and Atlantic railway.

Q. That was the road that was being built?

A. Yes, sir.

Q. By the construction company?

A. Mr. Fitzgerald was in charge of the construction work. He was the man that furnished funds for the construction company. He was the man who let contracts for grading and represented the construction company in letting contracts. He furnished the men and implements to the company, sent them there and instructed them as to their duties, and notified me in regard to instructions. He was in daily consultation with Mr. Mallory.

Q. Were his duties any different after the 4th of November, 1886, than they were before the 4th of November; and, if so, in what particular were they different?

A. The construction company had more work on hand after November, 1886, than they had between May and November, consequently his duties were greater after November than they were up to that time, because from November on was when the construction company did its greatest amount of work.

134 Q. Was there any difference in the kind of work that he did?

—. If supplying funds would be considered his work after November, I am not aware that Mr. Fitzgerald was president of the company, but previous to November, as treasurer of the company, we made some drafts upon him.

Q. What was the work he done up to November, 1886, worth per year?

Objected to by defendant as not within the issues of this case and incompetent, irrelevant, immaterial; overruled, defendant excepting.

Q. Do you know what it was worth, what he did?

Same objection, same ruling. Defendant ex.

A. He was general manager of the construction company and did the amount of work that the company was doing and spent the amount of money. His services certainly ought to be worth from eight to twelve thousand dollars a year.

Q. Is not this work of managers where the experience comes in, in letting contracts and determining heavy and light work and determining what work is worth to do a certain piece of work; was not a large portion of the contracts and all that kind of work done prior to November, 1886; was not a large portion of this work, such as a manager would do, done previous to November, 1886?

A. Yes; the same kind of work.

Q. The work that was done up until November you think was worth from eight to twelve thousand dollars a year?

A. I think the duties of that position were worth that; yes, sir.

Q. Were you ever present in New York when the matter of the payment of any promissory notes that were given by the construction company were up? And, if so, state what was said *and* about them, of giving bills payable or sight drafts for the benefit of the construction company in the directors' meeting. Were you ever present in any?

A. Yes, sir.

135 Q. When were you first present after May, 1888?

A. I think my first time was in July, 1888.

Q. State what was said and done about any notes that had been executed for the construction company.

Objected to unless it is shown that the proceedings of the meetings were not recorded; overruled; exception.

Q. In as few words as possible you may state previous to the meeting.

A. I think there was no meeting after I first arrived in New York. Previous to the meeting there was some informal meetings held, at which I was present with Mr. Dillon, Mr. Sage, and Mr. Cross, in which the matter of the construction company paper having been issued by the president of the construction company for the purpose of raising funds —, and in order to get money, as the construction company's credit was ruined in the West, it was necessary for Mallory and Fitzgerald to endorse the paper. The claims of the company were such that it was necessary to raise money to pay it. These gentlemen said they would have a meeting and take the matter up and see what could be done. They questioned me very closely in regard to the condition of our accounts with the Missouri Pacific

Railway Company, in which the construction company were large creditors. I stated that the Missouri Pacific Railway Company were indebted to our company.

Q. Was there anything said about the amount of notes given?

A. Yes, sir.

Q. To what amount was said to be given?

A. It was specified that it was necessary to have some $40,000 to pay off some of the most pressing liabilities of the company.

Q. I am speaking of the notes—bills payable. What was said about the amount of them?

A. It was specified that they had endorsed some $25,000 worth of paper for the construction company. That is the best of my
136 recollection.

Q. Was not it $40,000.00?

A. I think not. I think it was stated that there was some $25,000.00, which were pressing obligations.

Q. Did they make any objections to the fact that Mallory and Fitzgerald had endorsed the notes or that they had been given by Mallory for the construction company?

A. On the contrary, they expressed a great deal of interest, stating that they would use their personal and collective influence with Mr. Gould to have the Missouri Pacific Railway Company advance money enough to pay off those pressing liabilities.

Q. What did they mean by pressing liabilities; what were they?

A. $40,000; $25,000 worth of paper and $15,000 worth more of whatever it was. The books will show; I cannot attempt to carry all that, of course.

Q. There were other debts, too?

A. Yes; there were other debts, and those were the debts which were necessary to pay to prevent an innumerable number of suits being brought in different courts and judgments rendered, attorneys' fees and judgments by default, and all that sort of thing.

Q. Did they make any arrangement to pay them off?

A. They said they would see.

Q. Was there anything said there about assessing each man so much and pay off the indebtedness—that the stockholders should make up the sum?

A. The president of the construction company submitted in a full meeting of the board of directors a resolution to that effect, and Mr. Mallory and Mr. Fitzgerald stated that they would do their part.

137 Q. Did they, in this informal meeting, agree to advocate the raising of the amount by the stockholders to pay off these pressing liabilities before the formal meeting of the directors?

A. It is my impression that they agreed to give it their serious consideration; that they appreciated seriously the consideration and would do anything they could to remedy it.

Q. Did they make any arrangements at all about paying these pressing liabilities of the board of directors?

A. They agreed to use their influence with Mr. Gould to get him to have the Missouri Pacific Railway Company advance money

enough to the construction company to pay off those liabilities pending the final settlement.

Q. You were appointed an arbitrator, were you not, on Wednesday, for the construction company, with Mr. Clark on the other? Did the directors give you any authority that if there was an amount found due—any authority to have these pressing liabilities paid at once?

A. Yes, sir.

Q. You — state to the jury what steps you took, between you and Mr. Clark, to have these pressing liabilities paid off.

Objected to as immaterial; sustained. Exception.

Q. When was the work of the construction company finished—that is, when did they quit work? They had some contracts outside of the one where they were to receive bonds, did not they?

A. Yes, sir.

Q. Didn't they build some roads where they were to receive money?

A. Yes, sir.

Q. Did they build them after the contracts for which they were to receive the bonds from the Missouri Pacific or before?

Objected to; overruled. Exception.

138 A. They had outside contracts which were to be paid off in money. One was for building a line about 2 miles long to a stone quarry, and one about 6 miles long down the valley of the Verdegris river.

Q. When were those two lines built?

A. The first line was built and turned over in 1887—that was the two miles to the stone quarry—and the other line was completed, I think, in April, 1888.

Q. What work did Mr. Fitzgerald do between the first of January, 1888, and the first of May, 1888, for the construction company?

A. I received a good many instructions from him and requests from him for instructions what to do in certain cases. He had to make settlement with contractors, and I had to furnish Mr. Fitzgerald with information in regard to complaints made by contractors, etc.

Q. What was being done at that time by the construction company?

—. ——.

It is agreed that the office of general manager was not abolished until May, 1888, and that the general manager was entitled to his salary from Nov. 3, 1886, to May 1, 1888.

Cross-examination by Mr. WAGGENER:

Q. You are a son-in-law of Mr. Mallory?

A. Yes, sir.

Q. And engineer of this company during the prosecution of this work on the B., M. & A. by the Fitzgerald Construction Com.?

A. I was on the B., M. & A., but not the Fitzgerald & Mallory Construction Company.

Q. You drew a salary from the Fitzgerald and Mallory Construction Company?

A. I think they furnished the money, but, so far as I know, that is all.

Q. Didn't you draw a salary of $3,000.00 a year as general manager of this company—as chief engineer and general manager of the Denver, Memphis & Atlantic. You drew a salary from the Fitzgerald Construction Company for that position—in that capacity—

the construction company paid you the salary?

139 A. I believe they did.

Q. You were familiar with all the details of these transactions?

A. A good many.

Q. You lived at Chariton, Iowa?

A. A part of the time.

Q. You had charge of this work—that is, you had supervision of it on the ground?

A. Supervision of a part of it.

Q. You have taken quite an interest in this case for Mr. Fitzgerald?

A. No; not particularly.

Q. You have declined to furnish any information to the construction company except in the presence of counsel or upon the witness stand, have you not?

A. I don't understand it that way. I understood that there was a split in the construction company and one section of company came to me and wanted me to give them testimony, and I suggested to them that I would like to have counsel with me.

Q. Didn't I ask you about some information about one of these notes and you declined to give it except upon the witness stand? Did you decline to give me information except in the presence of counsel?

A. No, sir.

Q. You say between the first day of May, 1886, and November, 1886, Fitzgerald performed a great deal of work for this company?

A. Yes, sir.

Q. Did you report him on the pay-rolls of the company?

A. I did not have the making out of the vouchers of the superior officers.

Q. Was he on the pay-rolls of the company?

A. The superior officers of the company do not appear on

140 the pay-rolls.

Q. Answer the questions.

A. He didn't appear on the pay-roll.

Q. How much work did he do during the month of May, 1886?

A. He performed the duties of general manager of the Fitzgerald & Mallory Construction Company.

Q. You were general manager of the B., M. & A.?

A. Yes, sir.

Q. There were two general managers?

A. Two companies.

Q. How often was Mr. Fitzgerald on the work during the month of May, 1886?

A. I could not say exactly without reference to my books.

Q. Where are your books? Have you any books or memoranda in your memoranda that would state how many days he was there it May, 1886?

A. No; not how many days he was there, but I presume he was there half the time.

Q. Where was he the other half of the time?

A. His business called him to Kansas City to purchase supplies and send men; and I don't know whether he was in Kansas City; he was on the land the greater part of the time.

Q. Where was he in June?

A. I couldn't say where he was in June, but attending to the business of the company.

Q. What portion of the time was he on the work between the first day of May, 1886, and the first day of November, 1886?

A. He was attending to the business of the company all the time, but whether he was on the work or not—it is not necessary for a superior officer to be on the work.

Q. What business of the company was he doing during that time? What portion of the time did he devote to the company be-

141 tween the first day of May, 1886, and the first day of *May*, 1886?

A. I suppose that he devoted the greater part of the time——

Q. On the line?

A. To attention to the company's business.

Q. How do you know that all of his time was devoted to that?

A. Because I know that the amount of business there was there to do would require the greater part of the time.

Q. What kind of work did he do?

A. He spent a great deal of the time on the work going up and down the line.

Q. In a buggy?

A. Yes, and on foot and in engines, superintending track-laying, hiring men, etc.

Q. How many men did he hire?

A. He may have hired a few; he may have hired a hundred.

Q. Did he sign any contract?

A. He could not.

Q. Why not?

A. Because the by-laws of the construction company provide that the contracts for all work let shall be signed by the president.

Q. Did Mr. Fitzgerald sign any contract?

A. Yes, sir.

Q. Was Mr. Mallory down on the line?

A. Yes, sir.

Q. Superintending the business of the company?

A. He was there as president of the company.

Q. You were there as general manager of one and Fitzgerald of the other?

A. Yes, sir.

Q. Did it take all three of you to let the contract?

A. I didn't have much to do with letting the contract.

Q. How many miles of road were built between the first day of May, 1886, and the first day of November, 1886?

A. I think about 100 miles were under way at that time.

142 Q. How much was built, regardless of how many miles of grading, between the first day of May, 1886, and first day of November, 1886?

A. I guess about 120 miles.

Q. Between what points?

A. Between Toper and Leonard.

Q. You say the services performed by Mr. Fitzgerald during that time were worth eight or ten thousand dollars; a man who had railroaded it some time?

A. A man who had railroaded it 45 years and had experience in the capacity that Mr. Fitzgerald has ought to have that money, the services he performed and the position he occupied.

Q. Suppose he didn't occupy any position, the services actually performed, what were they worth?

A. 8 or ten thousand dollars a year.

Q. The services that he performed?

A. Yes, sir.

Q. Did he have anything to do with getting the right of way?

A. Yes, sir.

Q. Did he superintend that?

A. No, sir.

Q. Was it let to him in any respect?

A. He furnished the money to pay for a great deal of it.

Q. Did he employ an agent, or did he or Mallory have charge of that part of the work, getting the right of way, between the first day of May, 1886, and the first day of November?

A. They furnished certain knowledge for the employees of the railroad company to procure that right of way.

Q. Did they employ the persons who did it?

A. The construction company paid their salaries.

Q. Mr. Peckam was employed, was he?

A. He was general attorney for the railroad company.

Q. Who was the persons employed for superintending the right of way, and by whom?

143 A. Peckam and Anderson were the attorneys of the railroad company.

Q. They were paid by the construction company?

A. I think they advanced the money.

Q. They were on the pay-roll for so much per year?

A. No, sir.

Q. Don't you know that the construction company had been compelled to pay liabilities for a great many thousand dollars for the careless manner in which the work was done under Mr. Fitzgerald?

A. No, sir; but, on the contrary, the statistics — that there has not been a piece of railroad built in the United States in 1887 that was as well built and cost as little money as that road did there.

Q. I am asking about the work done between the first of May, 1886 and 1887.

A. I include the year 1886.

Q. Don't you know, as a matter of fact, that the company has paid out thousands of dollars by reason of the careless manner in which that work was done?

A. No, sir.

Q. Have you not approved vouchers as engineer to pay out money on account of the defects in the right of way?

A. There have been cases of error occurring in the title, the same as occurs in the construction of any railroad in the United States.

Q. Won't you answer the question?

A. Yes; I have approved vouchers.

Q. To what extent—what would they amount to at the present time?

A. I could not say. They are very small.

Q. Between 20 and $30,000?

A. No; I do not think so.

Q. You say you had a great deal of correspondence with Mr. Fitzgerald between the first of May and the first of November, 1886?

A. Yes, sir.

144 Q. Where from, Lincoln?

A. No; different points on the line—Lincoln, Kansas City.

Q. You stated that the greater bulk of the work was done since 1886?

A. Yes, sir.

Q. What was the difference between the per cent. done before and since November, 1886, of work?

A. I could not say very well.

Q. Would it amount to 50% more?

A. I don't know.

Q. Didn't you testify a few moments ago that the greater part was done subsequent to that date?

A. More was done subsequent.

Q. What time was you in New York in 1888?

A. In July.

Q. What time in July?

A. About the middle of July, I think.

Q. You were present at an informal meeting at which those directors were present?

A. It preluded a meeting. We were all together before the meeting was called to order. The conversation took place before that. A schedule of this indebtedness was made before and a statement of the indebtedness was made in the meeting, and also in a general way before the meeting.

Q. Was there any statement made to any person in your pres-

ence—to Mr. Mallory—covering these identical notes that had been sued upon?

A. The statement was made which included those notes.

Q. Were those notes specified or identified in that statement?

A. No; they were included in the statement.

Q. How do you know they were?

A. The statement was made out by my knowledge and under my personal supervision; it was made out by our auditor and I examined it.

Q. Was there any statement made there showing how
145 much was due the Chariton Bank?

A. Not to my knowledge.

Q. Was there any statement showing how much was due the Lincoln National Bank?

A. It was all in.

Q. Was there any statement that Fitzgerald or Mallory had endorsed any particular note?

A. The statement that they had endorsed a certain number of thousand dollars' worth of paper did not specify the note, but stated that they had endorsed a certain number of thousand dollars' worth of paper.

Q. Who made that statement?

A. I could not say whether it was when Fitzgerald was there or not.

Q. Didn't you say that he made the statement? Was he there?

A. I could not say.

Q. Did you hear him make that statement then?

A. I heard him refer to that matter of that paper.

Q. You have stated that Fitzgerald and Mallory both made this statement to that informal meeting of directors. Now, was Fitzgerald there?

A. My impression is that both Fitzgerald and Mallory referred to those notes, both formally and informally.

Q. To whom were they speaking and what persons were present when that statement was made?

A. I think Mr. Dillon, Mr. Hopkins, and Mr. Cross were present. I do not know that Mr. Sage was present. He generally came in and sat down for a moment, and got up and went out. I do not know that Mr. Sage was there long enough to give the matter any attention.

Q. Was Mr. Hopkins a director there at that time?

A. I think not.

Q. Who were the directors at that time, if you know?

A. I don't remember.

146 Q. Was there any statement made to the board of directors in your hearing by Mr. Fitzgerald or Mallory that any of these notes had been endorsed?

A. The statement was made by Mr. Fitzgerald and Mr. Mallory that they had endorsed $28,000 or $30,000 worth of paper.

Q. They specified the amount in that statement?

A. According to the best of my recollection, yes; in their conversation.

Here the taking of testimony was adjourned until to-morrow morning at 10 a. m.

OMAHA, NEBRASKA, *June 22nd*, 1889.

The taking of testimony was continued pursuant to adjournment, the same parties appearing on either side, — the following proceedings were had:

JOHN FITZGERALD, sworn for the plaintiff, examined in chief by Mr. MARQUETT, testified as follows:

Q. Where do you reside?
A. At Lincoln, Nebraska.
Q. How long have you been a resident of Nebraska?
A. For probably 20 or 21 years.
Q. What is your occupation?
A. My occupation is contractor, general business, farming, and banking.
Q. Contracting what?
A. Railroads.
Q. And building railroads?
A. And building railroads; yes, sir.
Q. How long have you been in the business of building and constructing railroads—about how long?
147 A. For over 40 years I did business directly for myself, and previous to that my father followed the business.
Q. Have you been largely engaged in it or not?
A. I commenced on a small scale and enlarged as I went along.
Q. (Hands witness Exhibit G 1.) There is a charge for track-laying tram?
A. Yes, sir.
Q. Well, did you furnish that to the construction company?
A. Yes, sir.
Q. At what date?
A. In 1886.
Mr. WAGGENER: What date in 1886?
Mr. MARQUETT: Is not the date there—is that the correct date?
A. It was in the early part of the construction of the road that we were building.
Q. About what time in 1886? In the spring of 1886?
A. It was in the spring of 1886. It was furnished before we commenced laying track.
Q. At whose instance did you furnish this?
A. At the instance of Mr. Mallory. I consulted with him, and we found it was necessary to have a tramway during a portion of the construction of the road.
Q. You say it was necessary to have it?
A. Yes, sir; because we could not haul with teams.

Q. What was that worth? At that time did you agree upon a price?

A. I set the price for less than it was worth. I set it for $1,500.00.

Q. That was less than it was worth, was it?

A. That was less than it was worth. It was worth at least $2,000.00, but as it was going into the construction company I put down the price as much as I could.

Q. I will ask you about this. (Hands witness Exhibit
148 F 1.) What is that for?

A. That is for scrapers.

Q. How many scrapers were they?

A. There is 175 bank-scrapers at $5.00 and 9 plows at $20.00 and 23 wheel-scrapers at $20.

Q. Did you furnish them to the construction company?

A. I furnished all of them scrapers to the construction company. We found we could not get tools as soon as we needed them, and I had some tools on hand in Iowa that was left there after I finished a road in Iowa at that time. We had ordered scrapers from Mount Pleasant and they could not furnish us only a small portion of the scrapers at the time, and so I furnished them 175 scrapers at $5, and they were worth $7.00, and furnished 9 plows at $20 each, and they were worth at least $30 each, and I furnished 23 wheel-scrapers which were worth at least $30 and I charged them only $20.

Q. Were these all delivered to the construction company?

A. They were all delivered to the construction company and used by it.

Q. Was this price agreed upon?

A. That was the price agreed upon with Mr. Mallory.

Q. (Hands witness Exhibit A 2.) Examine this note. Is that a renewal of any note?

A. Yes, sir.

Q. Where was the note, for which this is a renewal, given?

A. This was given for a note that went to protest in St. Louis.

Q. How came it to come to Lincoln?

A. I ordered it to be sent to Lincoln, and I took it up.

Q. You have paid that, have you?

A. Yes, sir.

Q. Is that John R. Clark's signature?

A. Yes, sir.

Q. Is he cashier?

A. He is cashier of the bank.

Q. Is there any notes out, except what you have got here, of the construction company?

A. No, sir; not that I know of.

149 Q. After these notes were first given, did you go to New York?

A. I went to New York twice.

Q. When first?

A. After the notes were given I went in July and August.

Q. Were you there in May?

A. Yes; and in May, too.

Q. Was the matter of having given these notes and you having endorsed them—you and Mr. Mallory—talked over at that time with the directors there?

A. Yes; that was the chief business to New York. We waited there for a few days to get Sidney Dillon, Russell Sage, and Mr. Cross to consult in the matter and to make arrangements for the directors there to get money to pay the indebtedness of the construction company, this indebtedness that Fitzgerald & Mallory were held responsible for. I also stated to Mr. Dillon that you gentlemen were not known in Nebraska as a construction company. There is no one known in Nebraska——

Q. They knew all about the giving of these notes?

A. They knew that, and they knew that there was more indebtedness, and I suggested the idea of having them assess the stockholders. They said they would do it the next day in meeting, and the next day when they met they said Mr. Gould proposed to send out an arbitration and have the whole thing fixed up. I left them and went to Washington.

Q. You have made charges here for expenses. Were you to any expense in attending to the business of this company after the first of January, 1888, that you made any charges for?

A. Yes; I was at an expense. I went to St. Louis and several places around to fix up and arrange matters with regard to the construction company. I went to New York.

Q. How many times did you go to St. Louis?

A. Several times.

150 Q. Did you have to go to Chicago?

A. I went to Chicago, New York, Kansas City, and Chariton, Iowa, and several other places.

Q. How many times on their business after that period did you go to New York?

A. Three times, it is probable.

Q. About what were your expenses?

A. I could not tell you my expenses exactly, because I have lost my memorandum book.

Q. You kept a memorandum book?

A. Yes; I could not tell exactly what it was.

Q. Have you looked for that memorandum book?

A. Yes, sir.

Q. That is where you usually keep your memorandums yourself?

A. I have tried several places. I have mislaid it and could not tell. I have tried and been unable to find it.

Q. About what was it?

A. Probably 6, 7, or $800.00; somewhere along there—probably $700.

Q. Did you incur any expense, pay out any money or incur any expenses for which they did not allow you at the time your expense account—what you paid out—was put in? Didn't you employ me and didn't I make a charge against you?

A. Yes; I employed Mr. Guthrie, and I employed you—Mr. Guthrie, of Atchison.

Q. I made a charge of $300.00 against you, did not I?
A. Three or four hundred dollars.
Q. For what?
A. Services and advice.
Q. What did you do—when did you and Mr. Mallory commence work on the railroad which was finally completed by this construction company?
A. We commenced in the spring of 1885.
151 Q. What did you do in the spring of 1885 to May, 1886?
A. In the spring of 1885 to May, 1886, I took charge of building 60 miles of road, let the contract by the mile, superintended the building of it, looked after it, and paid the bills as they came due.
Q. Furnishing your own money largely?

Objected to; sustained.

The WITNESS: I furnished my own money.
Q. Was there anything after you became organized—an understanding or agreement by which you were to be paid for the services and expenses incurred by you before this?

Objected to on the ground that there is no allegation of any agreement in writing.

Mr. WAGGENER: Was there any agreement in writing?
A. There was a verbal understanding.

The objection to the question asked by Mr. Marquett is sustained. Plaintiff excepts.

Mr. MARQUETT: There was no written agreement by which they were to refund to you the money expended, was there?
A. There was an understanding; there was no written agreement.
Q. They were to refund to you the money?
A. A portion of it.
Q. Were you by when the accounts were looked over and determined upon?

Objected to as immaterial; sustained; exception.

Cross-examination by Mr. WAGGENER:

Q. You say you reside at Lincoln, Nebraska?
A. Yes, sir.
Q. Mr. Mallory resides at Chariton, Iowa?
A. Yes, sir.
Q. And has for a number of years?
A. Yes, sir.
Q. The construction company has had no business in the
152 State of Nebraska, I believe—done no work in this State?
A. No; not the Fitzgerald & Mallory Company.
Q. That is, I mean the construction company?
A. No, sir.
Q. And has had no office in this State?
A. No; not that I know of.

Q. And, so far as you know of, no property in this State?
A. No, sir.
Q. At the time that you brought this suit did Mr. Mallory come over to assist you and counsel with you about this?
A. No, sir; I told Mr. Mallory. He opposed the suit from first to last, and when I was in New York I told the directors that I was going to bring a suit unless they settled the matter.
Q. Did Mr. Mallory come over and consult with you about bringing that suit?
A. No; not until after I had the suit brought, when I telegraphed for him to come on business; I wanted to see him.
Q. Why—to commence a suit in order to get service on him? He did not know what you were going to do?
A. No, sir.
Q. You resorted to this trick to get him over there?
A. I resorted to this to get him over there; I had other business also.
Q. As soon as he came over you had him served?
A. Yes, sir.
Q. He did not come over voluntarily?
A. No, sir.
Q. Is it not a fact that he came voluntarily?
A. No, sir.
Q. He came over in obedience to that message?
A. Yes, sir.
Q. You had your papers ready?
A. Yes, sir.
Q. As soon as he landed you sued?
A. As soon as he landed the papers were served on him.
Q. The telegram was sent for the express purpose of getting him over?
A. I telegraphed him that I wanted to see him on business.
153 Q. And that was the business?
A. Yes, sir; but I had other business.
Q. And that is the way you got the service?
A. Yes, sir.
Q. That tram—when was that delivered?
A. When we commenced track-laying.
Q. Was that before or after the construction company had incorporated?
A. It was after the construction Co. had incorporated.
—. What month was it delivered?
A. It was delivered in 1886.
Q. What month in 1886?
A. I could not tell you exactly the month.
Q. Was it in February or March?
A. Yes; probably.
Q. Either February or March?
A. Yes, sir.
Q. What road was it shipped over?
A. I think it came over the Mo. Pacific—a portion of it.

Q. It was shipped in February or March, 1886?
A. Somewhere along there in 1886.
Q. In speaking of this note of date July 31st, 1888, for $5,002.80, you say that note has been paid?
A. Yes, sir.
Q. How?
A. By me.
Q. How was it paid?
A. In money, I suppose.
Q. Is it not a fact that the bank of which you were president turned that note over to you to bring suit on?
A. No, sir.
Q. Did you pay it in currency?
A. It is paid by check.
Q. By check or note?
A. By check.
Q. You gave your check for it?
A. Yes, sir.
154 Q. You state to this jury at this time that the bank does not hold your note for this note here?
A. No, sir.
Q. Nor any part of it?
A. No, sir.
Q. You gave your check for it?
A. Yes, sir.
Q. And that check has been returned to you, has it?
A. I do not know whether it has or not.
Q. Has the amount of this note ever been taken out of your account with that bank?
A. The amount of that note has been paid by me. I am responsible for that note.
Q. Was the check drawn on the First National Bank of Lincoln, Nebraska?
A. I expect so.
Q. For $5,002.80?
A. I think so.
Q. Your account with that bank will show that that amount has been taken out of it to pay this note?
A. I presume so.
Q. Don't you know whether you paid it that way or not?
A. I paid the others or this; that I cannot say exactly. My clerk, when a thing of that sort *of thing* comes in, attends to it.
Q. Do you mean to be understood that you paid this to the bank and have not given the note to the bank?
A. I want you to understand that that is paid.
Q. That the bank does not hold your obligation for this note?
A. I think not.
Q. Do you want to be understood as saying that?
A. Yes, sir.
Q. If it did hold it you would know it, would not you?
A. Probably.

Q. Does the bank at Chariton, Iowa, hold your note?
A. I think not. It may have it for all I know.
Q. How did you pay those notes?
155 A. By assuming the whole indebtedness.
Q. Did you give your note for them?
A. I may have; some of them.
Q. Have you since taken up that note?
A. Probably I have.
Q. And probably you have not. Have you taken it up?
A. I think so.
Q. Don't you know?
A. I am not certain.
Q. Are you indebted to the Chariton bank on account of any of these transactions?
A. I think not.
Q. Have you paid the note that you gave that bank?
A. I think so.
Q. How was it paid?
A. I couldn't tell you exactly.
Q. Did Mallory pay it?
A. No, sir.
Q. Was it paid by a check drawn by you?
A. It might be drawn by me or some of my clerks.
Q. Don't you know whether it was or not?
A. I think it was.
Q. Did you ever give any instructions to have it paid?
A. Yes; I gave instructions that anything that I was liable for to pay it.
Q. Have you been advised that this Chariton bank note was paid?
A. Yes, sir.
Q. To whom?
A. They are paid; I know they are paid.
Q. The instructions could have nothing to do with them—I mean the notes that you gave when you took up that note?
A. I think so.
Q. Has that note been paid?
A. I think so.
Q. What was the length of time it was to run?
A. I couldn't tell you.
156 Q. You think that note was paid?
A. I think so.
Q. Will you say it has been paid?
A. I think it is paid.
Q. You have no personal knowledge on the subject?
A. I could not tell you exactly, but I know it has beenpaid; at least I think the note has been paid.
Q. By you?
A. By some of my men that happened to be attending to my business.

Q. Who asked you to take the notes out of the bank in Chariton, Iowa?

A. Myself.

Q. Did anybody ask you to endorse them?

A. Myself, because I wanted to get those things together. I didn't want to have this thing hanging any longer. I didn't want to be renewing and paying interest for the construction company.

Q. You assumed payment of them for the purpose of bringing this suit?

A. Yes; I assumed the payment.

Q. For the purpose of bringing this suit; it was on your own motion?

A. I knew that they were out, and I did not want them out any longer.

Q. You wanted them in order to bring this suit. When you went to New York, you say you told these people about these notes Q[illegible]hey refused to do anything about them?

was t[illegible]hey refused to call a meeting; they were waiting for J. Gould.

A. I and Mr. Dillon or Mr. Sage—I don't know which—we didn't

Q. Quorum. There was some call on Mr. Sage, and we had to served w[illegible] we made a statement before him, and they said they

A. I could see Mr. Gould the next day.

Q. Q. My question is this: As a matter of fact, they refused to do anything with them?

A. No, sir.

Q. They didn't do anything with them?

A. No; they agreed to the next day.

Q. In the talk that you had?

A. The next day, the day of the meeting, they appointed H. T. Clark and Mr. Thayer here, if my memory is right, as arbitrators, and the construction company said that the Missouri Pacific—they agreed, I think, that there was $175,000.00 in rolling stock that we had turned over to the Missouri Pacific, and they agreed to furnish that money to pay off the liabilities.

Q. Was not there a resolution offered at that meeting which you seconded to borrow money to pay some $158,000 that was voted down?

A. Yes; they could vote down anything they had a mind to, because they had a majority and did not want to pay their indebtedness.

Q. Did you tell them of the note held by the First National Bank of Lincoln, Nebraska?

A. I told them there were several obligations.

Q. Did you tell them of this note dated July 1st, due to the First National Bank of Lincoln?

A. I did not tell them of any particular notes, but that there were notes and they were not known in the construction company.

Q. Just before you brought this suit you went around and assumed these debts for the purpose of bringing suit?

A. Yes; and paid them.

Q. And that was done solely for the purpose of bringing that suit?

A. Certainly. I wanted to get the settlement from the construction company. They had no money and I wanted to get the matter settled.

Q. You had no other object in view excepting to bring the
158 suit and force the settlement?

A. I had the object in view that I wanted the matter brought to a close for the construction company.

Q. You did yourself, on your own motion, voluntarily go around and assume these debts?

A. Yes, sir.

Q. What time did you go to St. Louis from New York and Chicago?

A. I went to New York in May, June, and August.

Q. How many trips did you make to St. Louis?

A. I think 3 or 4.

Q. What were your expenses on your trip to St. Louis?

A. The best of my belief is that the whole expense was 6 hundred dollars.

Q. How much to St. Louis?

A. I could not tell you.

Q. How much to Chicago?

—. ——.

Q. How much to New York?

A. I could not tell you.

Q. That was in what year?

A. 1887 and 1888.

Q. Isn't it a fact that you went to these places for the purpose of looking after your own interests?

A. No, sir; for the purpose of looking after the construction company's and my own interest connected with it—that is, the construction company.

Q. You knew that the office of general manager has been abolished?

A. They abolished or tried to abolish the whole thing.

Q. Don't you know that the office of general manager had been abolished at the time that you made these trips?

A. Yes, sir.

Q. You went for the purpose of looking after the individual matters, as well as looking after the matters of construction?

A. Yes; I wanted to protect the interests of the construction company and myself.

159 Redirect examination by Mr. MARQUETT:

Q. Are you intending to say that the sole object you had in getting Mr. Mallory over there was to serve notice on him? Was not there other business?

Objected to as leading.

A. There was some other business, of course, but I had been trying to get a settlement out of those people for two years and could not get a settlement out of them. I had some other business with

Mr. Mallory besides, and I telegraphed him to come over, and he come over. Mr. Mallory opposed the suit from first to last, because they were promising from day to day that they would make settlement, and we went to New York several times——

Q. Is not it a fact that he was coming over most every week, or you going over there?

Objected to as leading.

Q. State in reference to that matter.

A. He had come over several times, and he and I had been in other business. Probably he did not come over weekly, but he came several times before and after that.

Recross-examination by Mr. WAGGENER:

Q. How many telegrams did you send him at that time?

A. I think only one.

Q. Did you send him one telegram, and he wanted to know what was the matter, and you sent another telegram saying come?

A. I think only one that day.

Q. And when he got there your papers were all ready, and he was served with the summons?

A. I think so.

Q. And that was the object of that telegram?

Objected to.

160 Redirect examination by Mr. MARQUETTE:

Q. What time did he reach there?

A. I could not tell you.

Q. Did you know anything about it when he was served?

A. No, sir.

Q. You don't know when he reached there or when he went away or when he was served?

A. No; I do not.

The defendant offers to file a plea of jurisdiction.

Objected to; overruled; plaintiff excepts.

T. M. MARQUETTE, sworn for the plaintiff, testified as follows:

I acted as attorney in the inception of this matter—that is, I went down to Kansas and looked over the articles of incorporation. The parties that were trying to get Fitzgerald & Mallory to take this had got a whole lot of aid that they were about to vote along their line of railroad. I think it aggregated very nearly a million. I looked over all those matters of aid. I was down twice and spent 3 or 4 days each time. In the winter of 1886 there came up a question which had been raised and this aid had been enjoined.

Q. What part of 1886?

A. I think it was December.

Q. Before this incorporation?

A. Yes, sir.

Objected to.

The WITNESS: They paid Mr. Guthrie for the same work—that is, they allowed that in New York—at least that is the bill that I saw; that last bill that was put in. He said that he could not tell the exact expense, and I said to Mr. Fitzgerald, I have charged you $300.00.

Objected to on the ground that the agreement was not in writing. With this the plaintiff rests.

161 The defendant asks that four books, including ledger, voucher book, and 2 other books, be considered in evidence

The COURT: You may use such parts of the books as are material to the issue.

The defendant moves the court for a nonsuit; overruled; exception.

The charter is considered in evidence, and also the secretary's book.

The defendant offers in evidence the minutes of the directors' meeting of December 17th, 1886.

Objected to as going back of the corporation and not material; overruled; exception.

Article 4 of the charter and articles 5 and 8 and also the balance of the articles of incorporation are read in evidence. The defendant offers in evidence a resolution of the board of directors giving authority to the president to raise funds to prosecute the work.

The defendant rests.

The plaintiff offers in evidence a part of a resolution referring to the amount due by the board.

The ledger, journal, and voucher book are requested to be left here by the defendant.

Here the court adjourned until Monday morning at 10 o'clock.

Before adjourning both parties were given leave to amend their pleadings to conform to the facts.

162 (A.)

Notice of Incorporation.

Notice is hereby given that the undersigned have this 7th day of April, 1886, associated themselves for the purpose of becoming incorporated under the provisions of chapter one of title nine of the Code of Iowa.

The name of such incorporation shall be the Fitzgerald & Mallory Constructfon Company, and its principal place for the transaction of business shall be at Chariton, Lucas county, Iowa.

The general nature of the business to be transacted by said company shall be the building, construction, and operation of railroads, by lease or otherwise, and the mining of coal, stone, and other minerals in the States of Iowa, Missouri, Nebraska, Colorado, Kansas, Arkansas, and the Indian Territory.

The amount of the authorized capital stock of said company shall

be one million dollars, to be paid in installments as called for by the board of directors.

This corporation shall commence on this 7th day of April, 1886, and shall terminate on the 7th day of April, 1896.

The affairs of said corporation shall be conducted by a board of directors, a president, vice-president, secretary, and treasurer, who shall be elected annually on the first Wednesday after the third Monday in April in each year.

The highest amount of indebtedness to which the corporation shall at any time subject itself shall be an amount not exceeding two-thirds of the amount of authorized capital stock.

Private property shall be exempt from corporate debts.

Witness our hands the day and date first above written.

JOHN FITZGERALD.
S. H. MALLORY.
E. A. TEMPLE.
S. S. KING.
T. M. STUART.

163 STATE OF IOWA, } ss:
Lucas County, }

I, S. S. King, on oath depose and say that I am editor and one of the publishers of the Chariton Democrat, a weekly newspaper printed at Chariton, Lucas county, Iowa; that the annexed printed notice of incorporation was published in said newspaper four consecutive weeks, to wit, on the 8th day of April, 1886; on the 15th day of April, 1886; on the 22d day of April, 1886; on the 29th day of April, 1886.

S. S. KING.

Sworn to before me and subscribed in my presence by the said S. S. King this 26th day of November, 1886.

W. P. BEEM,
Notary Public.

Publication fee, $—.

Notice of Amendment to the Articles of Incorporation of the Fitzgerald & Mallory Construction Company.

Notice is hereby given to all persons concerned that the undersigned, being three-fifths of all the board of directors of the Fitzgerald & Mallory Construction Company, have adopted an amendment to the articles of incorporation of said company, as follows, to wit: By striking out from article VI of said articles of incorporation the words "one million" and inserting in lieu thereof the words "one million five hundred thousand," so that said article as amended reads as follows:

Article VI. The authorized capital stock of the company shall be one million five hundred thousand dollars ($1,500,000) — shall be divided into shares of one hundred ($100) dollars each. The liabilities of the company shall not exceed two-thirds of the capital

stock. Each share of stock shall be entitled to one vote, and stockholders may vote either in person or by proxy.

Witness our hands this 6th day of May, 1886.

EDWARD A. TEMPLE,
T. M. STUART,
S. S. KING, *Directors.*

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164 STATE OF IOWA, } ss:
Lucas County, }

I, S. S. King, on oath depose and say that I am editor and one of the publishers of the Chariton Democrat, a weekly newspaper printed in Chariton, Lucas county, Iowa; that the annexed printed amendment to notice of incorporation was published in said newspaper four consecutive weeks, to wit, on the 6th day of May, 1886; on the 13th day of May, 1886; on the 20 day of May, 1886; on the 27 day of May, 1886.

S. S. KING.

Sworn to before me and subscribed in my presence by the said S. S. King this 26th day of November, 1886.

W. P. BEEM,
Notary Public.

Publication fee, $—.

(Pages 1 to 6, inclusive, are a record of the articles of incorporation.)

Page 7.

CHARITON, IOWA, *April 7th*, 1886.

Meeting of the directors of the Fitzgerald and Mallory Construction Company, at the office of S. H. Mallory, Chariton, Iowa.

Present: S. H. Mallory, John Fitzgerald, T. M. Stuart, and S. S. King.

On motion, T. M. Stuart was elected chairman and S. S. King secretary.

Mr. Mallory offered for the government of the company the following by-laws, to wit:

(Pages 7 to 11, inclusive, are a record of the by-laws.)

Page 11. These by-laws were considered by sections and adopted as read.

Page 12. On motion, the board of directors proceeded to the election of officers for the ensuing year, with the following result:

S. H. Mallory was elected president; John Fitzgerald was
165 elected V. P. and treasurer; S. S. King was elected secretary.

On motion, it was ordered that books of subscription of capital stock be now opened at the offices of the company at Chariton, Iowa, and at New York city on April 11, 1886.

Upon the opening of subscription books at Chariton 3,000 shares of stock were subscribed.

No further business appearing, the board adjourned.

S. S. KING, *Sec'y.*

Page 13.

Amendment to the Articles of Incorporation of the Fitzgerald & Mallory Construction Company.

The undersigned, Edward A. Temple, T. M. Stuart, and S. S. King, being three-fifths of all the board of directors of said Fitzgerald & Mallory Construction Company, by virtue of authority vested in us by law and by the articles of incorporation of said company as executed and adopted by us, have adopted an amendment to said articles of incorporation, as follows, to-wit:

That article VI of said articles of incorporation be, and the same is hereby, amended by striking out the words "one million" and inserting in lieu thereof the words "one million five hundred thousand," so that said article as amended shall read:

"Article VI. The authorized capital stock of the company shall be one million five hundred thousand ($1,500,000) dollars, which shall be divided into shares of one hundred ($100) dollars each. The liabilities of the company shall not exceed two-thirds of the capital stock. Each share of stock shall be — to one vote, and stockholders may vote either in person or by proxy."

Witness our hands this 6th day of May, A. D. 1886.

EDWARD A. TEMPLE,
T. M. STUART,
S. S. KING, *Directors.*

STATE OF IOWA, }
Lucas County, } *ss:*

166 Before me, the undersigned, a notary public in and for Lucas county, Iowa, personally appeared Edward A. Temple, T. M. Stuart, and S. S. King, who are personally known to me to be the identical persons whose names are fixed to the foregoing amendment to articles of incorporation, and acknowledged the same to be their voluntary act and deed.

Given under my hand and official seal this 6th day of May, A. D. 1886.

[SEAL.] FRANK R. CROCKER,
Notary Public.

I hereby certify that the article recorded on this page is true copy of the original amendment.

S. S. KING,
Sec. F. & M. C. Co.

Page 14.

CHARITON, IOWA, *May 11th*, 1886.

Meeting of the board of directors of the Fitzgerald and Mallory Construction Company, at the office of the president.

Present: S. H. Mallory, president, S. S. King, secretary, and T. M. Stuart.

Mr. Mallory presented a contract entered into on the 28th day of April, A. D. 1886, between the Denver, Memphis & Atlantic Railway Company of Kansas, and the Fitzgerald & Mallory Construction Company of Iowa, whereby the said construction company engages to build a line of standard-gauge railway from the east line of Kansas to the west line thereof.

On motion, said contract was approved. See record, pages 15, 16, and 17.

Mr. Mallory presented a contract entered into the 4th day of May, 1886, between the Missouri Pacific Railway Company and the Fitzgerald & Mallory Construction Company, said contract being further explained by an instrument of writing attached to said contract, signed by A. L. Hopkins, as vice-president of said Missouri Pacific Railway Company, bearing date the 6th day of May, A. D. 1886, which contract was, on motion, approved. See record, pages 18, 19, and 20.

167 The resignation of E. A. Temple as a member of the board of directors was accepted, dating from this date.

On motion, Mr. Russell Sage, of New York, was elected to fill the vacancy on the board of directors caused by the resignation of Mr. Temple.

Adjourned.

S. S. KING, *Sec'y.*

(Pages 15, 16, and 17 are a record of the contract between the D., M. & A. R'y Co. and Fitzgerald & Mallory Construction Co. referred to in the minutes.)

(Pages 18, 19, and 20 are a record of the contract between the Mo. Pac. R'y Co. and the Fitzgerald & Mallory Construction Co. referred to in the minutes.)

Subscription to Fitzgerald & Mallory Construction Company.

Capital stock limited to $1,500,000.

We, the undersigned, each severally agree to and with the Fitzgerald & Mallory Construction Company that we will take and pay for the number of shares of the capital stock of said company set opposite our respective names in the manner following: Shares to be one hundred ($100) dollars each, and payment of subscriptions to be made upon call therefor by the president of said company.

Dated Chariton, Iowa, 1886.

Name.	Residence.	Shares.
John Fitzgerald, by S. H. Mallory	Lincoln, Neb.	2,250
S. H. Mallory	Chariton, Iowa	2,250
Jay Gould	New York	3,000
Henry G. Marquand	New York city	1,000
A. L. Hopkins	" "	500
George J. Gould	" "	5,000
Sidney Dillon	" "	1,000
Russell Sage	" "	2,000
Morton, Bliss & Co.	" "	2,000
[illegible] & S. Wormser	" "	500

168 *Articles of Incorporation.*

The undersigned, John Fitzgerald, of the State of Nebraska; S. H. Mallory, T. M. Stuart, E. A. Temple, and S. S. King, of the State of Iowa, do by these presents incorporate ourselves as a contracting, mining, and transportation company, in common with all others who may become hereafter interested therein, in accordance with these articles of incorporation under the laws of the State of Iowa, formed for the purpose of contracting to build and operate railroads by lease or otherwise, mining for coal and such other minerals, stone, etc., as may be deemed expedient in the States of Iowa, Missouri, Kansas, Colorado, Nebraska, Arkansas, and the Indian Territory, and do adopt the following articles of incorporation:

Article first. The name of the corporation shall be The Fitzgerald & Mallory Construction Company.

Article second. The object of this corporation is the construction of railroads by contract and the operation thereof, mining for coal or any other mineral, quarrying stone, and such other material connected therewith as may be deemed expedient.

Article third. This corporation shall commence on the date of these articles, and shall continue for a period of ten (10) years, and may be renewed as by law provided.

It shall have perpetual succession, and may sue and be sued by its corporate name, and shall have a common seal, which it may alter and renew at pleasure.

The interest of the stockholders shall be transferable as prescribed by the by-laws to be adopted by the board of directors.

The private property of the stockholders shall be exempt from corporate debts, so far as permitted by law.

The corporation may make contracts, acquire and transfer property, real and personal, establish by-laws, and make all rules and regulations deemed expedient in accordance with the
169 law and these articles, and do all acts which are necessary and proper to carry into effect the object of this incorporation.

Article fourth. The business of the corporation shall be managed by a board of five (5) directors.

The above-named corporation shall constitute the first board of directors, who shall hold their office until their successors shall be

elected at the first annual meeting of the stockholders for the election of directors in the year 1887, as herein provided.

The first annual meeting of the stockholders for the election of directors shall be held in the city of Chariton, Iowa, on the first Wednesday after the third Monday in April, A. D. 1887, and on the same day each year thereafter after two weeks' previous notice shall have been given in one newspaper published in the city of Chariton, Iowa.

The directors herein constituted or to be elected thereafter shall hold their office until their successors are duly elected and qualified.

Article fifth. The directors shall fill vacancies in their own number as may be by by-law prescribed. They shall manage the business of the corporation; they shall have power to sell, lease, or mortgage all their property and lands acquired by said corporation; to issue the bonds of the same, signed by the proper officers thereof, for the purpose of raising money to carry on the business of the corporation, and to secure the same by mortgage upon real estate, buildings, machinery, and other property of the company. They shall also appoint a president and vice-president from their own number, a secretary and treasurer, who may or may not be directors, and such other officers as may be deemed necessary.

They shall keep a record of all their proceedings, which shall be open to the inspection of the stockholders, as shall also be the stock books and records of the corporation.

170 Article sixth. The authorized capital stock of the company shall be one million ($1,000,000) dollars, which shall be divided into shares of one hundred ($100) dollars each.

The liabilities of the company shall not exceed two-thirds of the capital stock.

Each share of stock shall be entitled to one vote, and stockholders may vote either in person or by proxy.

Article seventh. The board of directors may cause books to be opened for the subscription of stock at such times and places as they may deem advisable, and may in the by-laws provide for the calling of special meetings of the stockholders and of the board of directors.

Article eighth. All certificates of stock, contracts, and bonds shall be signed by the president and secretary.

Article ninth. The principal place of business of this corporation shall be at Chariton, Iowa, and all meetings of stockholders shall be held at that place.

Article tenth. These articles may be amended by the consent, in writing, of three-fifths of all the board of directors or by a vote of the majority of the stock at any regular or special meeting after three weeks' notice given in a newspaper published in Chariton, Iowa, specifying the proposed amendment.

Witness our hands this 6th day of April, A. D. 1886.

(Signed) S. H. MALLORY.
" EDWARD A. TEMPLE.
" JOHN FITZGERALD.
" T. M. STUART.
" S. S. KING.

STATE OF IOWA, } ss:
Lucas County, }

Before me, the undersigned, a notary public in and for said county, this day personally appeared S. H. Mallory, E. A. Temple, John Fitzgerald, T. M. Stuart, and S. S. King, who are personally
171 known to me to be the identical persons whose names are affixed to the foregoing articles of incorporation as incorporators, and acknowledge the same to be their voluntary act and deed.

Given under my hand and official seal this 7th day of April, 1886.

(Signed) W. P. BEERN,
Notary Public. [SEAL.]

STATE OF IOWA, } ss:
Lucas County, }

I, J. B. Smith, recorder of Lucas county, in the State of Iowa, do hereby certify that the above and foregoing is full, true, and complete copy of the articles of incorporation of the Fitzgerald & Mallory Construction Company as the same appear of record in my office in Book No. one (1) of Articles of Incorporation, on page 193.

Witness my hand this 7th day of April, A. D. 1886.

(Signed) J. B. SMITH,
Recorder, Lucas County, Iowa.

Amendment to Articles of Incorporation, Fitzgerald & Mallory Construction Company.

The undersigned, Edward A. Temple, T. M. Stuart, and S. S. King, being three-fifths of all the board of directors of said Fitzgerald & Mallory Construction Company, by virtue of the authority vested in us by law and by the articles of incorporation of said company, as executed and adopted by us, have adopted an amendment to said articles of incorporation as follows, to wit:

That article VI of said articles of incorporation shall be, and the same is hereby, amended by striking out the words "one million" and inserting in lieu thereof the words "one million five hundred thousand," so that said article as amended shall read as follows:

172 "Article VI. The authorized capital stock of the company shall be one million five hundred thousand ($1,500,000) dollars, which shall be divided into shares of one hundred ($100) dollars each. The liabilities of the company shall not exceed two-thirds of the capital stock. Each share of stock shall be entitled to one vote, and the stockholders may vote either in person or by proxy."

Witness our hands this 6th day of May, A. D. 1886.

(Signed) EDWARD A. TEMPLE,
" T. M. STUART,
" S. S. KING, *Directors.*

STATE OF IOWA, } ss:
Lucas County, }

Before me, the undersigned, a notary public in and for Lucas

county, Iowa, this day personally appeared Edward A. Temple, T. M. Stuart, and S. S. King, who are personally known to me to be the identical persons whose names are affixed to the foregoing amendment to articles of incorporation, and acknowledged the same to be their voluntary act and deed.

Given under my hand and official seal this 6th day of May, A. D. 1886.

(Signed) FRANK R. CROCKER,
[SEAL.] *Notary Public.*

A true copy.

(Signed) S. S. KING, *Sec'y.*

By-Laws Fitzgerald & Mallory Construction Company of Iowa, Adopted April 7th, 1886.

SECTION 1. The officers of this company shall be a president, vice-president, secretary, and treasurer, and such other officers as may be deemed necessary to carry out the object of the articles of this incorporation.

SECTION 2. The business of the company shall be managed
173 by a board of five directors, any three of which number shall constitute a quorum for business.

SECTION 3. The president shall perform the duties that usually pertain to the duties of his office and be the chief executive officer of the company, and, in the absence of contrary instructions by the board of directors, shall be charged with the general management of the business of the company.

SECTION 4. The vice-president, in the absence of the president or his inability to act, will act as president.

SECTION 5. The secretary shall keep in a well-bound record book a full journal of all the proceedings of the board of directors and the meetings of the stockholders; also file and keep all papers belonging to the company that come into his possession, and record such as he shall be directed to by a vote of the stockholders or board of directors.

SECTION 6. The treasurer shall give bonds, with sureties to be approved by the board of directors before entering upon the duties of his office, in the penal sum of twenty thousand ($20,000) dollars, conditioned upon the faithful discharge of the duties pertaining to his office and the safe-keeping and proper accounting for all moneys that may come into his hands as treasurer. He shall pay out money only upon the order of the president and such other officers as may be ordered by the board of directors. He shall make a statement of the financial condition of the company as often and in such manner as he may be instructed by the board, and at each annual meeting of the stockholders he shall make a full and complete statement of the financial condition of the company. He shall keep in proper books a regular account of the stock of the company with each stockholder

in the usual manner, keeping a correct account of all trans-
174 fers, so that at any time a perfect list of the stockholders can be made and the amount paid by each, and, as far as practicable, the residence of each stockholder.

SECTION 7. The annual meeting of the board and of the stockholders shall be held on the first Wednesday after the third Monday in April of each year. All other meetings of the board shall be at the call of the president or three members of the board.

SECTION 8. At all meetings of the stockholders absent members may vote by proxy duly authorized in writing.

SECTION 9. Special meetings of the stockholders may be called at any time by the board of directors by first giving twenty days' notice of the time, place, and object of the meeting in writing in each stockholder's address or by publishin g such notice in a newspaper published at Chariton, Iowa.

SECTION 10. All accounts before being paid shall be approved by the president or such other officers as the board shall designate.

SECTION 11. Certificates of stock shall be issued when fully paid for according to the terms of subscription: Provided, that in case where the subscription is for more than one hundred shares the same may be issued and delivered in blocks of 100 shares whenever the payments on such subscription amount to a block of ten thousand ($10,000) dollars or any multiple thereof; certificates to be signed by the president and countersigned by the secretary.

If an subscriber of stock shall fail or refuse to pay for his stock in accordance with the conditions of his subscription the company may proceed to collect the same, or it may declare his contract of subscription void, and, in such case, such subscriber shall forfeit all payments made on such subscription and all right to demand or receive any stock thereon except all blocks of one hundred shares of said stock which have been fully paid for.

SECTION 12. All transfers of stock to be valid must be made
175 on the books of the company.

SECTION 13. All vacancies occurring in the board shall be filled by a majority of the board at any regular or special meeting of said board.

SECTION 14. These by-laws may be altered or amended by a vote of a majority of the whole board of directors at any meeting called for that purpose by giving at least ten days' notice in writing.

(Signed) S. H. MALLORY, *President.*
(Signed) S. S. KING, *Sec'y.*

Contract between the Fitzgerald and Mallory Construction Company and the Denver, Memphis and Atlantic Railway.

This agreement, made this 28th day of April, 1886, by and between the Fitzgerald & Mallory Construction Company, of the State of Iowa, party of the first part, and the Denver, Memphis & Atlantic Railway Company, a corporation duly organized under the laws of the State of Kansas, party of the second part, witnesseth:

Now, therefore, it is agreed between the parties hereto as follows:

The party of the first part agrees to furnish all materials and money and to construct as rapidly as may be determined from time to time between the parties hereto a line of railroad from the east line of Kansas to the west line thereof, and equip the same as the same may be hereafter located; to properly grade the line according to the engineer's survey of the same; to furnish oak ties on curves not less than 2,600 to the mile and steel of not less than 56 pounds to the yard.

To build such depots and stations as may be determined upon by the party of the second part; to build all necessary sidings or turnouts, and generally to construct the same equal to the railroad now being built in Southern Kansas.

176 And upon the completion thereof to equip the same with at least one thousand dollars ($1,000) of rolling stock per mile.

In consideration thereof and payment therefor the party of the second part agrees to pay to the party of the first part sixteen thousand dollars ($16,000) per mile of its full-paid capital stock for every mile of completed road to be constructed and sixteen thousand dollars ($16,000) per mile in its first-mortgage bonds per mile of single track of said road; said bonds to be of the denomination of one thousand ($1,000) dollars each, or of such denominations as may be agreed upon by the parties hereto, and bearing interest at the rate of — per cent. per annum, payable in the city of New York and State of New York, where the principal is also payable.

Said bonds to be issued for the construction of said road under this contract shall be dated January 1st, 1886, and run thirty years from date, and to be secured by trust deed of even date therewith, duly executed by the party of the second part to the company therein named on the aforesaid line and branches thereof.

The said Denver, Memphis & Atlantic Railway Company hereby agrees to issue and deliver to said party of the first part the said stock and bonds at the rate hereinbefore set forth, at such times and in such settlement as the said Fitzgerald & Mallory Construction Company require in order to obtain the money necessary to perform this contract.

And also to deliver to said first party all municipal and county bonds voted and to be voted in aid of said railroad and all donations thereto as soon as earned and delivered to said second party, and said Fitzgerald & Mallory Construction Company covenants and agrees to proceed forthwith in the execution of this agreement, and to construct said line as rapidly as possible according to

177 the surveys now made or to be hereafter determined upon.

In witness whereof the said Fitzgerald and Mallory Construction Company, by their president, has hereto set their hand and seal and said party of the second part has caused its corporate

name to be signed by its president and its corporate seal to be attached by its secretary the day and year first above written.

FITZGERALD & MALLORY CONSTRUCTION COMPANY,
By S. H. MALLORY, *President.*
THE DENVER, MEMPHIS & ATLANTIC RAILWAY COMPANY,
By J. J. BURNS, *President.*
Attest: CHAS. C. BLACK, *Secretary.*

Agreement Between the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company.

Memorandum of an agreement made on this 4th day of May, 1886, between the Missouri Pacific Railway Company, party of the first part, and the Fitzgerald and Mallory Construction Company, party of the second part, witnesseth:

Whereas the party of the second part has made a contract with the Denver, Memphis and Atlantic Railway Company to construct its road from Chetopa across the State of Kansas on a line heretofore agreed upon (copy of which is hereto attached and made a part of this agreement);

And whereas the Missouri Pacific Railway Company is desirous of obtaining control of the said line of railroad, it is agreed as follows:

First. The party of the second part will sell to the party of the first part all of the securities which the said party of the second part is to receive under the terms of the contract dated April 28th, 1886, between the said Fitzgerald & Mallory Construction Company and the Denver, Memphis and Atlantic Railway Company for the construction of its road, said securities amounting to sixteen
178 thousand dollars ($16,000) per mile of stock and sixteen thousand dollars ($16,000) per mile of first-mortgage bonds, less the amount of stock that has to be given for municipal and county aid (estimated at about thirty-five hundred ($3,500) per mile), and receive in full payment for the same twelve thousand dollars ($12,000) per mile of Missouri Pacific railway five (5) per cent. bonds, to be secured by a deposit of the securities above referred to with a trustee.

Second. The party of the second part further agrees that the said railroad to be constructed and heretofore described shall be of standard gauge, of not less than fifty-six (56) pound steel rails, twenty-six hundred (2,600) ties to the mile, with stations not more than eight (8) miles apart and water-stations not more than twenty (20) miles apart, and shall be equal in its general character to the roads now being constructed by the Missouri Pacific Railway Company in the State of Kansas; all to be subject to the approval of the chief engineer of the party of the first part.

In witness whereof the said Missouri Pacific Railway Company and the said Fitzgerald & Mallory Construction Company, parties

hereto, have executed this agreement the day and year first above written.

THE MISSOURI PACIFIC RAILWAY COMPANY,

[SEAL.] By JAY GOULD, *President.*

Attest: GUY PHILLIPS, *2nd Ass't Secretary.*

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

By S. H. MALLORY, *President.*

It is further agreed that the party of the first part shall make payments for the sixteen thousand dollars ($16,000) per mile of first-mortgage bonds and sixteen thousand dollars ($16,000) per mile of stock, referred to in the first clause of this contract, as follows:

On the completion of each ten miles of road, according to
179 the contract, from not more than two points connecting with the road of the party of the first part and on receipt of the sixteen thousand dollars ($16,000) per mile of first-mortgage bonds and sixteen thousand dollars ($16,000) per mile of stock appertaining thereto (less the amount paid out for aid) the party of the first part will deliver to the party of the second part twelve thousand dollars ($12,000) per mile of its 5 % bonds, according to the above agreement.

The party of the first part also agrees that all men and materials used by the party of the second part in the construction of said railroad shall be transported at actual cost over such portions of the road as may be turned over to the party of the first part during the construction of the same.

THE MISSOURI PACIFIC RAILWAY COMPANY,

By JAY GOULD, *President.*

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

By S. H. MALLORY, *President.*

195 BROADWAY, NEW YORK CITY, *Nov.* 3, 1886.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company called by the president there were present Messrs. Russell Sage, S. H. Mallory, and John Fitzgerald.

On motion of Mr. Sage, seconded by Mr. Fitzgerald, J. C. Otteson was appointed secretary of the meeting.

President Mallory read the resignations of S. S. King and T. M. Stuart as directors, which, on motion of Mr. Fitzgerald, seconded by Mr. Sage, were accepted.

On motion of Mr. Sage, seconded by Mr. Fitzgerald, Mr. Geo. J. Gould was elected a director to fill the vacancy caused by the resignation of Mr. King. Mr. Gould being present, he immediately took
180 his seat as a member of the board.

On motion of Mr. Fitzgerald, seconded by Mr. Sage, Mr. Richard Cross was elected a director in place of Mr. Stuart, who resigned.

Mr. Fitzgerald then tendered his resignation as treasurer, and on motion of Mr. Sage, seconded by Mr. Gould, the same was accepted.

On motion of Mr. Fitzgerald, seconded by Mr. Sage, Mr. Cross was elected treasurer.

On motion of Mr. Sage, seconded by Mr. Fitzgerald, J. C. Otteson was appointed as assistant secretary.

Mr. Fitzgerald also offered his resignation as vice-president, which, on motion of Mr. Sage, seconded by Mr. Gould, was accepted.

On motion of Mr. Sage, seconded by Mr. Gould, Mr. Fitzgerald was elected general manager of the company.

On motion of Mr. Fitzgerald, seconded by Mr. Sage, Mr. George J. Gould was elected vice-president in place of Mr. Fitzgerald, who resigned.

On motion of Mr. Sage, the meeting adjourned to meet at 10.30 a. m. Thursday, November the 4th, 1886.

J. C. OTTESON,
Ass't Secretary.

195 BROADWAY, NEW YORK CITY, *November 4th*, 1886.

Pursuant to adjournment, the board met to-day at 10.30 a. m.

Present: Messrs. George J. Gould, R. Cross, R. Sage, J. Fitzgerald, and S. H. Mallory.

The minutes of the previous meeting were read and, on the motion of Mr. Sage, approved.

President Mallory reported that the following gentlemen were in the employ of the company:

Mr. J. J. Burns, of Belle Plaine, Kansas (president of the Denver, Memphis & Atlantic R'y Co. and president of the Excelsior Town & Mining Co.), at a salary of $2,500 per annum and travelling expenses when away from home. His duty is to look after the
181 interests of the railway company and to work up the municipal aid and attend to the management of the town-lot business.

Mr. C. C. Black, of Winfield, Kansas (vice-president and secretary of the railway company), with salary and duties the same as Mr. Burns, on the east end of the road, Chetopa Division.

Messrs. Peckham & Henderson, attorneys of Sedan, having charge of the legal business and right of way matters, each at a salary of $2,500 per annum, Mr. Peckham being in charge of Chetopa Division and Mr. Henderson in charge of Conway Division.

D. J. Thayer (civil engineer and general manager of the D., M. & A. R'y Co.), at $3,000 per annum, in charge of the engineering and construction of the lines, all work being done with his approval.

Also an auditor at Wichita, with salary at present of $1,200 per annum.

On motion of Mr. Sage, the report was approved.

On motion of Mr. Cross, the salaries of the general manager and the president of the construction company were fixed at $5,000 and $7,500 per year, respectively.

There being no further business, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

195 BROADWAY, NEW YORK CITY, *November 5th*, 1886.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company held this day there were present Messrs. Russell Sage, Richard Cross, and George J. Gould.

Mr. Cross presented a request from Mr. Mallory to have the treasurer honor drafts drawn by D. J. Thayer in his name, as president.

On motion of Mr. Sage, the request was approved.

There being no further business, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

182 195 BROADWAY, NEW YORK CITY, *Dec. 17th*, 1886.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company held this day there were present Messrs. Russell Sage, Richard Cross, and George J. Gould.

On motion of Mr. Cross, it was

Resolved, That Mr. Mallory and Mr. Fitzgerald be requested to furnish the company with a statement of the expenditures that had been made, but not yet audited, and to settle the balance which, with that, would make the amount due on their stock so as to make it full paid.

On motion of Mr. Sage, it was resolved that whereas the company is temporarily in debt—

Resolved, That the treasurer of the company be, and he is hereby, authorized to borrow the money on the credit of the company and to pledge as collateral the aid bonds at such current rate of interest as the market warrants.

On motion, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

195 BROADWAY, NEW YORK CITY, *Feb'y 4th*, 1887.

At a meeting of the directors of the Fitzgerald and Mallory Construction Company held this day at the call of the president there were present Messrs. R. I. Cross, Russell Sage, George J. Gould, and S. H. Mallory.

The minutes of the meeting held Nov. 5th and Dec. 17th, 1886, were read, and, on motion of Mr. George J. Gould, were approved.

Mr. Mallory stated that he has paid out on his individual account, before the contract with the Missouri Pacific Co. was executed and up to this date, the sum of $51,676.93, and that Mr. Fitzgerald had paid in the same way $62,889.22, a total of $114,566.15, and that credit should be given them in their subscription to the stock of the construction Co. for that amount.

183 Mr. Mallory reported that $168\frac{8}{10}$ miles of road had been finished at a cost of $1,621,995.00, but that this amount did not include unpaid freight charges.

On motion of Mr. Sage, Messrs. R. I. Cross and A. L. Hopkins were appointed a committee to examine Mr. Mallory's accounts and to make a report on the condition of the company.

On motion of Mr. Sage, the meeting adjourned to meet on Saturday, Feb'y 5th, 1887, at 2 o'clock p. m.

J. C. OTTESON,
Ass't Secretary.

195 BROADWAY, NEW YORK CITY, *Feb'y 5th*, 1887.

At an adjourned meeting of the directors of the Fitzgerald & Mallory Construction Company held this day there were present Messrs. S. H. Mallory, George J. Gould, R. I. Cross, and R. Sage.

The minutes of the previous meeting were read, and, on motion of Mr. Sage, were approved as corrected.

Mr Mallory reported that he estimated that it would cost $557,586.00 to build the Udall line, and $1,132,831.00 to build from the east line of Ness county to the west line of the State of Kansas, a total of $1,690,417.00.

On motion of Mr. Cross, the meeting adjourned to meet Monday, Feb'y 7th, at 2 p. m.

J. C. OTTESON,
Ass't Secretary.

195 BROADWAY, NEW YORK CITY, *Feb. 7th*, 1887.

An adjourned meeting of the directors of the Fitzgerald and Mallory Construction Company was held this day, at which there were present Messrs. S. H. Mallory, George J. Gould, R. I. Cross, and R. Sage, also Mr. Jay Gould.

The minutes of the previous meetings were read, and, on motion of Mr. Sage, were approved.

Mr. Jay Gould, on behalf of the Missouri Pacific Railway
184 Company, stated that certain portions of the Denver, Memphis and Atlantic railway were unsatisfactorily constructed, and for that reason the Missouri Pacific Co. would decline to pay more than $10,000 per mile for the 150 miles already built, and that the Missouri Pacific Co. was ready to take the 150 miles named at that price—that is, the line from Chetopa to Cedarvale and enough line from Belle Plaine west to make up the 150 miles.

On motion of Mr. Cross, duly seconded, it was

Voted, That the proposition of the Missouri Pacific Railway Company to receive 150 miles of road and give Missouri Pacific Railway Company trust 5% bonds for the same, at the rate of ten thousand dollars per mile, in full settlement be accepted.

On motion, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

195 BROADWAY, NEW YORK CITY, *March 25th*, 1887.

At a meeting of the directors of the Fitzgerald and Mallory Construction Company held to-day there were present Messrs. George J. Gould, R. I. Cross, and Russell Sage.

The minutes of the last meeting were read and, on motion, approved.

On motion of Mr. Cross, seconded by Mr. Sage, it was

Resolved, That, inasmuch as Messrs. John Fitzgerald and S. H. Mallory are unable to advance their share of the funds required by the construction company, the treasurer be, and he is hereby, authorized to borrow the sum of $300,000 on the notes of the company, signed by himself as treasurer, and to pledge as security for the said loan the Missouri Pacific Railway Company five per cent. trust bonds belonging to the construction company.

On motion, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

Minutes of Annual Meeting Fitzgerald & Mallory Construction Company.

185 CHARITON, IOWA, *April 20th*, 1887.

This being the day fixed by the articles of incorporation of the Fitzgerald & Mallory Construction Company for the annual meeting of the stockholders of said company for the election of directors, there was present at the office of the company, in Chariton, Iowa, S. S. King, the secretary of said company, in his own proper person and as agent and attorney for Jay Gould, Henry G. Marquand, A. L. Hopkins, George J. Gould, Sidney Dillon, Russell Sage, Morton, Bliss & Co., I. & S. Wormser, S. H. Mallory, and John Fitzgerald.

The said secretary then placed on file a certain *instruction* in writing in words and figures as follows, to wit:

"Know all men by these presents that we, the undersigned, do hereby constitute and appoint Mr. S. H. Mallory or Mr. S. S. King attorney or agent for us and in our names to vote for the election of Messrs. S. H. Mallory, Sidney Dillon, John Fitzgerald, Russell Sage, and R. I. Cross as directors at the annual meeting of the Fitzgerald & Mallory Construction Company to be held at Chariton, Iowa, April 20th, A. D. 1887.

In witness whereof we have hereunto set our hands and seals this 11th day of April, one thousand eight hundred and eighty-seven.

A. L. HOPKINS.
GEORGE J. GOULD.
MORTON, BLISS & CO.
I. & S. WORMSER.
JAY GOULD.
H. G. MARQUAND.
RUSSELL SAGE.
SIDNEY DILLON.

Sealed and delivered in presence of—
J. C. OTTESON."

And the said secretary then placed on file a further instrument in writing in words and figures as follows, to wit:

"Know all men by these presents that we, the undersigned, S. H. Mallory and John Fitzgerald, do hereby constitute and appoint S. S. King our attorney and agent for us and in our names to
186 vote for the election of S. H. Mallory, Sidney Dillon, John Fitzgerald, Russell Sage, and R. I. Cross as directors at the annual meeting of the Fitzgerald & Mallory Construction Company to be held at Chariton, Iowa, April 20th, A. D. 1887.

Witness our hands this 11th day of April, A. D. 1887.

S. H. MALLORY.
JOHN FITZGERALD.

And the said secretary then placed on file a further instrument in writing in words and figures as follows, to wit:

Stockholders Fitzgerald & Mallory Construction Company.

Jay Gould	3,000	shares.
H. G. Marquand	1,000	"
George J. Gould	500	"
Sidney Dillon	1,000	"
Russell Sage	3,500	"
Morton, Bliss & Co.	2,000	"
I. & S. Wormser	500	"
John Fitzgerald	1,500	"
S. H. Mallory	1,500	"
A. L. Hopkins	500	"
Total	15,000	

The above is a correct list of the stockholders April 20, 1887.

S. H. MALLORY,
Pres't F. & M. Cons. Co.

And the said secretary then placed on file a further instrument in writing in words and figures as follows, to wit:

STATE OF IOWA, }
Lucas County, } ss:

I, W. F. White, on oath depose and say that I am foreman of the Chariton Democrat, a weekly newspaper printed at Chariton, Lucas county, Iowa; that the annexed printed notice was published in said newspaper two consecutive weeks, to wit, on the 31st day of March, 1887, on the 7th day of April, 1887.

W. F. WHITE.

Sworn to before me and subscribed in my presence by the said W. F. White this 20th day of April, 1887.

[SEAL.] F. R. CROCKER,
Notary Public, Lucas County, Iowa.

187 *Copy of Advertisement.*

Stockholders' meeting.

Public notice is hereby given that the annual meeting of the stockholders of the Fitzgerald & Mallory Construction Company will be held at the office of the company, in the city of Chariton, Iowa, on Wednesday, April 20th, 1887, at 2 o'clock p. m. Said meeting is for the purpose of electing five directors of said company for the ensuing year and for the transaction of such other business as may legally come before said meeting.

S. H. MALLORY, *President.*
S. S. KING, *Secretary.*

Whereupon the said S. S. King, being duly empowered thereto, proceeded to cast the ballots of the above-named Jay Gould, H. G. Marquand, George J. Gould, Sidney Dillon, Russell Sage, Morton, Bliss & Co., I. & S. Wormser, John Fitzgerald, S. H. Mallory, and A. L. Hopkins for the election of five directors for the ensuing year, with the following result:

S. H. Mallory	received	15,000	votes.
Sidney Dillon	"	15,000	"
John Fitzgerald	"	15,000	"
Russell Sage	"	15,000	"
R. I. Cross	"	15,000	"

Whereupon the said secretary did then and there declare the said S. H. Mallory, Sindey Dillon, John Fitzgerald, Russell Sage, and R. I. Cross to be duly elected directors of the Fitzgerald & Mallory Construction Company for the year next ensuing the date hereof.

(Signed) S. S. KING, *Secretary.*

NEW YORK CITY, *July 28th*, 1887.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company, held at the office of Messrs. Morton, Bliss & Co., No. 20 Nassau street, New York city, this day, there were present Messrs. R. I. Cross, Russell Sage, and Sidney Dillon.

188 On motion of Mr. Sage, the minutes of the previous meetings of the directors and the minutes of the last annual meeting of the stockholders were read and approved, and the certificate of the directors' election was ordered to be placed on file.

The directors then balloted for the election of officers of the company for the ensuing year, with the following unanimous result:

For president, Mr. S. H. Mallory.
For vice-president, Mr. Russell Sage.
For general manager, Mr. John Fitzgerald.
For treasurer, Mr. R. I. Cross.
For secretary, Mr. S. S. King.
For ass't secretary, Mr. J. C. Otteson.

Mr. Cross stated that the company is indebted to its stockholders to the extent of $1,500,000 for money borrowed, and that it is in-

debted to the Missouri Pacific Railway Company for $772,856.27 and to Messrs. Morton, Bliss & Co. to the extent of about $600,000. Mr. Cross also stated that at least $500,000 will be required to complete the company's contract with the Missouri Pacific Railway Company. In view of this the following resolution was offered by Mr. Cross and unanimously adopted:

Resolved, That the treasurer is hereby instructed to sell a sufficient amount of the Missouri Pacific Railway Company's trust five per cent. bonds at not less than 90 to provide funds to pay off the amount borrowed, amounting to $1,500,000 and interest, and that for the further purposes of the company the treasurer is authorized to sell further amounts of the same bonds at the same price to the extent of said $4,000,000 in all to the shareholders, with the understanding that the *pro rata* share of these bonds of any stockholder who is not prepared to take his share within ten days from this date shall be first offered to the other stockholders *pro rata*.

On motion of Mr. Cross, it was

189 Voted, That the treasurer is hereby authorized to borrow from Jay Gould $2,500,000 of the Missouri Pacific Railway Company's five per cent. bonds, to be returned to him when the construction company receives the bonds due under its contract with the Missouri Pacific Railway Company.

On motion of Mr. Sage, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Aug. 20th*, 1887.

A meeting was called for to-day, to be held at 11 a. m., at the office of Messrs. Morton, Bliss & Co., No. 28 Nassau street; but, there being no one present but Mr. Cross, the meeting adjourned.

J. C. OTTESON, *Sec'y.*

A meeting was called for Sept. 13, 1887, but was postponed to the next day (Sept. 14, '87) by request of Mr. Mallory, who said he could not be present.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Sept. 14th*, 1887.

The directors' meeting called for to-day was postponed, to take place Thursday, Sept. 15, 1887, to enable Mr. Mallory to be present, as he did not arrive in time.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Sept.* 15, 1887.

Pursuant to adjournment, the meeting of the directors of the Fitzgerald & Mallory Construction Company was held to-day at the office of Messrs. Morton, Bliss & Co., No. 28 Nassau street, at 11 o'clock a. m.

Present: Messrs. Sage, Cross, and Dillon.

On motion of Mr. Cross, the minutes of the last four meetings were read and approved.

Mr. Cross reported that the debt of the construction company to the Missouri Pacific Company amounted to $520,131.92 and to Messrs. Morton, Bliss & Co., including drafts advised on the way, $350,000, and that it was therefore necessary to act on the
190 resolution passed by the board of directors at the meeting held July 28, 1887, and sell the $800,000 of bonds which have not been taken by Messrs. Fitzgerald and Mallory.

Mr. Cross asked for the authority of the board to sell the bonds, as he had arranged to dispose of them to the stockholders of the construction company, who were ready to take up the same according to the resolution referred to above.

Mr. Sage stated that Mr. Mallory had requested that before any further action is taken the board adjourn until Monday next to enable his (Mr. Mallory's) partner, Mr. John Fitzgerald, to be present, and, on motion of Mr. Dillon, the meeting adjourned to Monday, Sept. 19th, 1887, at 11 o'clock a. m.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Sept.* 19, 1887.

Pursuant to adjournment, the meeting of the directors of the Fitzgerald & Mallory Construction Company was held to-day at the office of Messrs. Morton, Bliss & Co., No. 28 Nassau St., New York city.

Present: Messrs. S. H. Mallory, Russel Sage, John Fitzgerald, and R. I. Cross.

Owing to the absence of Mr. Jay Gould, who has been expected to be present, the meeting, on motion of Mr. Cross, adjourned, to meet Tuesday, Sept. 20th, 1887, at 1 o'clock p. m., at 195 Broadway, N. Y. city.

J. C. OTTESON, *Ass't Sec'y.*

NEW YORK CITY, *Sept. 20th*, 1887.

Pursuant to adjournment, a meeting of the directors of the Fitzgerald & Mallory Construction Company was held at 195 Broadway this day.

Present: Messrs. S. H. Mallory, Russell Sage, John Fitzgerald, R. I. Cross.

After a long discussion by members of the board, it was, on motion of Mr. Cross,

191 Voted, That the treasurer of this company be, and he is hereby, authorized to sell $2,000,000 of the Missouri Pacific Railway Company five per cent. bonds at 90% to provide funds for the completion of the work of the construction company & to give the stockholders *pro rata* the first option of buying the same.

Mr. Cross, on behalf of himself and Mr. A. L. Hopkins, a committee appointed at the meeting held Feb'y 4th, 1887, to ascertain as to the correctness of the amount reported by Mr. Mallory as having been paid out previous to the execution of the contract with the

Missouri Pacific Railway Company, reported that Mr. Mallory's account had been examined and found to be correct.

The meeting then adjourned, to meet at the call of the secretary.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Sept.* 22, 1887.

Pursuant to call, a meeting of the directors of the Fitzgerald & Mallory Construction Company was held at No. 195 Broadway, New York city, to-day.

Present: Messrs. S. H. Mallory, John Fitzgerald, Russel Sage, R. I. Cross, and Sidney Dillon.

On motion of Mr. Dillon, it was unanimously

Voted, That the resolution passed at the last meeting of the directors providing for the sale of $2,000,000 of Missouri Pacific Railway Company's 5% bonds be amended so as to read as follows:

Resolved, That the treasurer of this company be, and he is hereby, authorized to sell $1,800,000 of the Missouri Pacific Railway Company's 5% bonds at 90% to provide funds for the completion of the work of the construction company, and that said bonds be sold to the following stockholders of the company (who were ready to buy the same) as follows:

Russell Sage	$375,000
Morton, Bliss & Co.	300,000
Jay Gould	675,000
H. G. Marquand	150,000
Sidney Dillon	150,000
George J. Gould	75,000
192 I. & S. Wormser	75,000
Total	$1,800,000

On motion of Mr. Dillon, it was unanimously

Voted, That a dividend of 100% on the outstanding stock of the company, payable in Missouri Pacific Railway Company 5% bonds, be and is hereby declared, and that said dividend be paid by the treasurer of the company on and after the 23rd day of September, 1887, at his office, No. 28 Nassau street, N. Y. city.

Mr. Mallory proposed that the division station be located at Winfield, as the inducements offered by the citizens had been very liberal, and also for the reason that the town was at the end of a grade. The board took no action in regard to the matter, but it was understood that the matter should be left to Mr. S. H. H. Clark, V. P. Mo. Pac. Ry. Co.

On motion, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Jan'y 19th*, 1888.

Pursuant to call, a special meeting of the directors of the Fitzgerald

and Mallory Construction Company was held to-day at No. 195 Broadway, N. Y. city.

Present: Messrs. Sage, Dillon, & Cross.

Mr. Sage read a letter from President Mallory, who said that he would require about $120,000 to finish the road, and that the Mo. Pac. was indebted to the construction company to the extent of about $675,000, which the R. R. Co. had declined to pay. No action was taken in the matter, but it was agreed that Mr. George Gould should send a telegram to Mr. Warner to verify Mr. Mallory's statement in regard to amount owed by Mo. Pac. Co.

On motion of Mr. Russell Sage, the following resolutions were unanimously voted:

193 Resolved, That the certificates of the capital stock of this company which have been signed by the vice-president or the ass't secretary of this company be, and the same are hereby, acknowledged to be as binding upon this company as if the said certificates had been signed by the president or secretary.

Resolved, That the vice-president and the ass't secretary of this company are hereby authorized to sign the certificates of the capital stock of this company or any other documents which it may be necessary for this company to execute.

On motion of Mr. Cross, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Ap'l 6th*, 1888.

Pursuant to a call for a meeting of the directors of the Fitzgerald & Mallory Construction Company, the following gentlemen met at 2 o'clock p. m., at 195 Broadway, to-day:

President Mallory, Mr. Sage, Mr. Cross, and Mr. Dillon.

President Mallory stated to the meeting that the Missouri Pacific Railway Company was indebted to this company for a large amount for rebates on freight, rolling stock, and extra work.

On motion of Mr. Sage, Mr. R. I. Cross was appointed a committee to confer with the Missouri Pacific Railway Company for the purpose of having a payment made on account of these rebates, rolling stock, and extra work.

On motion of Mr. Sage, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *April 13th*, 1888.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company, pursuant to the call of the vice-president, there were present Sidney Dillon, R. Sage, and R. I. Cross.

Upon motion of —— ——, Mr. Guy Phillipps was appointed secretary *pro tem.*

194 Upon motion of Mr. Cross, seconded by Mr. Dillon, it was

Resolved, That the vice-president be, and he is hereby, authorized and directed to sign, on behalf of this company, a proxy to vote at the annual meeting of the stockholders of the Pueblo &

State Line Railroad Company, to be held at Pueblo, Colo., on the 26th day of April, 1888, upon the shares of said Pueblo & State Line Railroad Company standing in the name of the Fitzgerald & Mallory Construction Company; also

Resolved, That the secretary be, and he is hereby, directed to have a certified copy of these resolutions made and attested and sealed with the seal of this company, and to forward same, with the proxy aforesaid, to the ass't secretary of the Missouri Pacific Railway Company at St. Louis.

Adjourned.

GUY PHILLIPS,
Secretary pro Tem.

NEW YORK CITY, *April 14th*, 1888.

At a meeting of the directors of the Fitzgerald and Mallory Construction Company Messrs. Sidney Dillon, Russell Sage, and R. I. Cross were present.

Vice-President Sage stated to the meeting that he had signed the power of transfer on certificate No. 6 of the Pueblo & State Line R. R. Co. for 15,495 shares standing in the name of the Fitzgerald & Mallory Construction Company, said certificate having been previously delivered to the Missouri Pacific R'y Co. in payment for the 5% bonds of the last-named company.

Upon motion of Mr. Cross, seconded by Mr. Dillon, the action of the vice-president was approved and confirmed.

The meeting thereupon adjourned.

J. C. OTTESON,
Ass't Secretary.

195 CHARITON, IOWA, *April 18th*, 1888.

Annual meeting of the Fitzgerald & Mallory Construction Company, at the office of the company, in the city of Chariton, Iowa.

There were present—

S. H. Mallory, representing	1,200	shares.
" proxy for Jay Gould, rep'g	4,000	"
" " " H. G. Marquand, rep'g	1,000	"
" " " A. L. Hopkins "	500	"
" " " G. J. Gould, "	500	"
" " " Sidney Dillon, "	1,000	"
" " " Russell Sage, "	2,700	"
" " " Morton, Bliss & Co., "	2,000	"
" " " I. & S. Wormser, "	500	"
F. R. Crocker, for John Fitzgerald, rep'g	1,200	"
S. S. King, for J. J. Burns, rep'g	300	"
Total shares represented	14,900	

being a majority of all the stock of said company.

All of the above proxies in writing and in due form were filed with the secretary.

On motion, Mr. S. H. Mallory was chosen chairman of the meeting and S. S. King secretary.

The minutes of all previous meetings were read and approved.

On motion, the stockholders' meeting proceeded to vote for five directors for the ensuing year, voting by ballot.

The ballot being canvassed showed the following result:

S. H. Mallory received 14,900 votes.
Sidney Dillon " 14,900 "
John Fitzgerald " 14,900 "
Russell Sage " 14,900 "
R. I. Cross " 14,900 "

Whereupon the said S. H. Mallory, Sidney Dillon, John Fitzgerald, Russell Sage, and R. I. Cross were declared duly elected directors of the Fitzgerald & Mallory Construction Company for one year from the date hereof.

The secretary presented and placed on file a copy of the published notice of the annual meeting, copy of which is hereto attached, which notice was duly proven by the affidavit of Fred. B. Voiland, foreman, to have been published in the Chariton Democrat, a weekly newspaper published at Chariton, Iowa, in its issues of April
196 5th and 12th, 1888.

Copy of Notice of Stockholders' Meeting.

Stockholders' meeting.

Public notice is hereby given that the annual meeting of the stockholders of the Fitzgerald & Mallory Construction Company will be held at the office of the company, in the city of Chariton, Iowa, on Wednesday, April 18th, 1888, at 2 o'clock p. m. Said meeting is for the purpose of electing five directors of said company and for the transaction of such other business as may legally come before said meeting.

S. H. MALLORY, *President.*

S. S. KING, *Secretary.*

There being no further business, the meeting of stockholders adjourned *sine die.*

(Signed) S. S. KING, *Sec'y.*

NEW YORK, *May 3rd*, 1888.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company held at 195 Broadway there were present Messrs. Mallory, Sage, and Dillon.

Meeting was adjourned to 2 o'clock p. m. May 4th, 1888.

J. C. OTTESON,
Ass't Sec't'y.

NEW YORK, *May 4th*, 1888.

Pursuant to adjournment, a meeting of the directors of the Fitzgerald & Mallory Construction Company was held to-day at 195 Broadway.

Present: Messrs. Sage, Mallory, Dillon, and Cross.

On motion of Mr. Sage, Mr. Cross took the chair.

On motion of Mr. Sage, the meeting proceeded to the election of officers for the ensuing year.

On motion of Mr. Dillon, Mr. S. H. Mallory was elected
197 president and Mr. Russell Sage was elected vice-president for the year.

On motion of Mr. Dillon, voted that the office of general manager be abolished.

On motion of Mr. Sage, Mr. R. I. Cross was elected as treasurer, Mr. S. S. King elected as secretary, and Mr. J. C. Otteson assistant secretary for the ensuing year.

On motion of Mr. Sage, seconded by Mr. Dillon, the following resolution was unanimously passed:

Whereas the road contracted to be built by this company is nearly or quite complete; and

Whereas nothing remains to be done by this company beyond the settlement of its accounts and some right of way cases—

Resolved, That the salaries of the general officers shall cease, and that the compensation to be paid to the president for his services and for such assistance as he may employ to aid him in closing up the affairs of the construction company and in conducting the business of the town company shall be submitted to the board.

On motion of Mr. Mallory, seconded by Mr. Dillon, it was

Resolved, That in settling up the business of the Fitzgerald and Mallory Construction Company the president is hereby authorized and empowered to bring suits at law in all cases where an amicable settlement cannot be had between the company and the parties thereto.

Owing to a previous engagement Mr. Sage excused himself and left the meeting at this point of the proceedings.

President Mallory read a report in regard to the work done by the construction company and the status of the company at the present time. He stated in his report that the—

Chetopa Division, 144.76 miles, cost an ave. of $11,670 per mile.

Conway Springs Division, 127.26 miles, cost an ave. of $11,197.34 per mile.

Western Springs, 138.46 miles, cost an ave. of $9,042.80.

198 Kans. & So'west., 24.84 miles, cost an ave. of $10,761.66.

Pueblo & State Line, 51.34 miles, cost an ave. of $10,865.29.

The price per mile for the last named, P. & S. L., not including bridges. The total number of miles constructed was 586.66, at a total cost of $6,407,285.55, including outside work. Besides this there would be required $71,100 to finish up, as follows: For appeal cases (estimated), $40,000; truss bridge at Pueblo, $23,500; track and yard at Chivington, $2,500; turn-table at Chivington, $1,150; and expenses of closing up, about $3,000. These expenses would make the average cost per mile of the 586.66 — constructed $11,042.91.

No action was taken, and the meeting adjourned to meet in the morning.

J. C. OTTESON,
Ass't Secretary.

NEW YORK, *May 5th*, 1888.

At a meeting of the Fitzgerald and Mallory Construction Company held at 195 Broadway there were present Messrs. Mallory, Dillon, & Cross; also Messrs. Jay Gould and S. H. H. Clark.

A long discussion followed in regard to rate of Missouri Pacific Company for construction material. Mr. Mallory claimed that Mr. Jay Gould agreed to allow him a rate of ⅞ cents per ton per mile. Mr. Gould denied that he had made any such agreement.

Mr. Clark claimed that the Pueblo & State Line railway was not constructed according to agreement. Mr. Mallory said that it was.

No formal action was taken in regard to either matter, but the meeting adjourned with the understanding that Mr. Clark and Mr. Mallory would make reports in regard to the P. & State Line R'y from their respective standpoints.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *May 8th*, 1888.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company at 195 Broadway there were present
199 Messrs. Sage, Fitzgerald, Mallory, and Dillon.

No action was taken and meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

Fitzgerald & Mallory Construction Company, board of directors.

195 BROADWAY, NEW YORK, *July 12th*, 1888.

The board of directors of the Fitzgerald & Mallory Construction Company met this day at 195 Broadway, New York, at 2 o'clock p. m.

Present: Messrs. John Fitzgerald, S. H. Mallory, Sidney Dillon, R. I. Cross, and Russell Sage.

President Mallory occupied the chair and Mr. Guy Phillips was appointed secretary *pro tem.*

The president stated that the object of the meeting was to raise funds to meet the liabilities of the company, and, in that connection, he submitted to the meeting a statement showing its financial condition at the present time according to its books.

The matter was discussed, but no formal action taken.

The meeting, on motion, adjourned.

GUY PHILLIPS,
Secretary pro Tem.

NEW YORK CITY, *July 13th*, 1888.

At a meeting of the board of directors of the Fitzgerald & Mallory

Construction Company held this day there were present Messrs. S. H. Mallory, Russell Sage, Sidney Dillon, and John Fitzgerald.

On motion of Mr. Dillon, it was

Resolved, That in order to effect a speedy settlement of the accounts between the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company, resolved as a matter of compromise that this company recommends to its stockholders to accept 35% for their stock instead of 40%, which had been previously asked, and thus close up the accounts between the two companies.

200 Adjourned.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *July 17th*, 1888.

Pursuant to the request of the president, a meeting of the directors of the Fitzgerald & Mallory Construction Company was called for to-day at 195 Broadway.

Present: Messrs. Russell Sage, S. H. Mallory, and John Fitzgerald.

On motion, the meeting adjourned to the office of Messrs. Morton, Bliss & Co., 28 Nassau street, in order that Mr. Cross might be present.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *July* 17, 1888.

Parsuant to adjournment, a meeting of the directors of the Fitzgerald & Mallory Construction Company was held at the office of Messrs. Morton, Bliss & Co., No. 28 Nassau St., New York city.

Present: Messrs. Sage, Cross, Mallory, and Fitzgerald.

Mr. Sage was appointed chairman.

President Mallory then read a report to the meeting in regard to the financial condition of the company, which was directed to be filed.

The following preamble and resolutions were offered by President Mallory:

Whereas a satisfactory and full statement of the actual condition of the Fitzgerald and Mallory Construction Company showed that $158,840 is urgently required to pay necessary judgment notes becoming due and current expenses for closing up its pending right of way, and other business has been furnished this board by its president; be it

Resolved, That this board do authorize the treasurer to negotiate at once and on the best terms possible a loan of that amount,

201 as Mr. Gould's action on Mr. Clark's recommendation to advance $60,000 to us on account and his reply to our proposal of a basis of settlement show that no immediate relief can be expected from the Missouri Pacific Company.

This resolution was seconded by Mr. Fitzgerald, but was not passed, Messrs. Cross and Sage stating that they could not vote for it, and

that it would be impossible to negotiate a loan in New York, as the company had no collaterals.

During the discussion which took place after Mr. Mallory offered his resolution Mr Sage read the following memorandum:

"As to Mallory Construction Company, let it be understood, first, that the Missouri Pacific does not shrink its contract or wish to modify or avoid it, but carry it out in good faith. We put the whole matter on our side in the hands of Mr. Clark, who has no pecuniary interest in either Missouri Pacific or construction company. He insists, 1st, that as Mallory company has received the full payment of bonds, that the right of way shall be made perfect; otherwise our bonds purport to be on a road we do not own.

"I would recommend the construction company appoint some equally disinterested person to be authorized to take up and settle all matters with Mr. Clark, and, if they fail to agree, they to choose a third party; the decision of the majority to be final.

"(Signed) JAY GOULD."

On motion of Mr. Cross, it was unanimously

Resolved, That the settlement of the affairs of this company with the Missouri Pacific Railway Company be referred to arbitration in accordance with Mr. Gould's memorandum, and that Mr. Thayer, chief engineer, be, and is hereby, duly authorized to represent this company, with full authority to appoint, in conjunction with the Missouri Pacific Company's representative, the third arbitrator in case they cannot agree, it being understood that the Missouri
202 Pacific executive committee shall confer like authority on Mr. S. H. H. Clark to represent it in such arbitration.

Mr. Sage left the meeting at this point. The meeting adjourned after some further discussion.

J. C. OTTESON,
Ass't Secretary.

NEW YORK CITY, *Aug.* 17, 1888.

At a meeting of the directors of the Fitzgerald and Mallory Construction Company held at the office of Messrs. Morton, Bliss & Co. to-day Messrs. Sage, Dillon, & Cross were present.

Mr. Sage acted as chairman of the meeting.

On motion of Mr. Cross, Mr. Applegate was appointed secretary *pro tem.*

Mr. Dillion stated that the meeting was called for the purpose of confirming the action of the Missouri Pacific Railway Company in appointing referees to settle the matters in dispute between the two companies.

On motion of Mr. Dillon, it was

Resolved, That the appointment of Mr. S. H. H. Clark on behalf of the Missouri Pacific Railway Company and Mr. D. J. Thayer on behalf of the construction company, as arbitrators to settle questions in dispute between the two companies, is hereby confirmed, and that in case they cannot agree they to choose a third arbitrator.

Moved by Mr. Dillon that Mr. Cross communicate with President Mallory the fact that this action was taken. Carried.

Adjourned.

F. M. APPLEGATE,
Secretary pro Tem.

NEW YORK, *Aug.* 21*st*, 1888.

A meeting of the board of directors of the Fitzgerald & Mallory Construction Company was held to-day at the office of Messrs. Morton, Bliss & Co., there being present Messrs. Mallory, Fitzgerald, and Sage, Cross, and Dillon; the president, Mr. S. H. Mallory, in the chair.

203 The following resolution was read by Mr. Mallory:

Resolved, That the treasurer of the Missouri Pacific Railway Company be, and he is hereby, authorized to pay the unsettled claims for rights of way and depot grounds of the Denver, Memphis & Atlantic Railway Company, the Pueblo & State Line Railway Company, and the Kansas & Southwestern Railway Company, and that he charge the same to the Fitzgerald & Mallory Construction Company account: Provided however, that no such payment shall be made until the Fitzgerald & Mallory Construction Company, by its president or chief engineer, shall certify to the correctness of the vouchers.

This resolution was seconded by Mr. Sage, which after discussion, on being put, was unanimously carried.

On motion, the meeting adjourned.

F. M. APPLEGATE,
Secretary pro Tem.

NEW YORK CITY, *Jan'y* 11*th*, 1889.

Pursuant to call, a meeting of the directors of the Fitzgerald & Mallory Construction Company was held at 195 Broadway, New York city, at two p. m.

Present: Messrs. Cross, Sage, and Dillon.

On motion, the meeting was adjourned until Tuesday, Jan'y 15th next, at 2 p. m.

J. C. OTTESON, *Ass't Sec'y.*

NEW YORK CITY, *Jan'y* 15*th*, 1889.

An adjourned meeting of the board of directors of the Fitzgerald and Mallory Construction Company was held at 195 Broadway, N. Y. city, to-day.

Present: Messrs. Sage and Dillon.

No quorum being present, the meeting was adjourned until Wednesday, Jan'y 16th, 1889, at two p. m.

J. C. OTTESON, *Ass't Sec'y.*

NEW YORK CITY, *Jan'y* 16, '89.

Pursuant to adjournment, a meeting of the directors was 204 held at 195 Broadway to-day at 1 p. m.

Present: Messrs. Sage, Cross, and Dillion; A. H. Calef, sec'y *pro tem.*

On motion of Mr. R. I Cross, it was unanimously

Resolved, That M. T. Frame, Esq., of Atchison, Kans., is hereby authorized to appear and represent this company as its sole attorney in all suits and proceedings at law or in equity now pending or which may hereafter be brought by or against this company or in which this company has any interest whatsoever in any of the State or Federal courts of the States of Kansas and Nebraska; the said M. T. Frame to also have full authority to represent this company as its sole attorney before any referee, master in chancery, commissioner, or other officer appointed by any court in Nebraska or Kansas; to hear, pass upon, or report in any proceeding in which this company has any interest, and generally to represent this company as its sole attorney in all legal matters in which it is interested in either or both of said States of Nebraska and Kansas, whether the same may be pending in court or not; this employment to be an exclusive one and to continue until revoked by further action of this board. Further

Resolved, That the assistant secretary of this company be, and he is hereby, directed to communicate this action to Mr. Frame and to furnish him with a certified copy of these resolutions.

On motion, the meeting adjourned.

A. H. CALEF,
Secretary pro Tem.

NEW YORK CITY, *March 14th*, 1889.

Special meeting of the board of directors of the Fitzgerald & Mallory Construction Company, called by order of the vice-president.

President: Messrs. Sage, Cross, & Dillon.

The vice-president stated that in consequence of the non-agreement between the arbitrators who had been selected by the
205 Missouri Pacific Railway Company and this company, Messrs. S. H. H. Clark and D. J. Thayer, the Mo. Pac. R'y Co. had named as the third arbitrator Mr. H. L. Morrill, general manager of the St. Louis & San Francisco R'y Co., and requested that this company would concur in his name as the third arbitrator to settle the matters between the Mo. Pacific R'y Co. and the Fitzgerald and Mallory Construction Co.

On motion of Mr. Cross, seconded by Mr. Dillon, the selection of Mr. H. L. Morrill as the third arbitrator was approved and confirmed by this board.

On motion of Mr. Dillon, the meeting adjourned.

J. C. OTTESON,
Ass't Secretary.

NEW YORK, *April 1st*, 1889.

At a meeting of the directors of the Fitzgerald & Mallory Construction Company held this date at the office of Mr. R. I. Cross, N. Y. city, there were present Messrs. Cross, Sage, & Dillon.

On motion of Mr. Dillon, Mr. J. C. Otteson, assistant secretary, was

authorized to attend to the publication of the notice of the annual meeting of the stockholders, and to sign said call as ass't sec'y.

Adjourned.

J. C. OTTESON,
Ass't Sec'y.

Now, on this 17th day of April, A. D. 1889, at 2 o'clock p. m., the stockholders of the Fitzgerald & Mallory Construction Company convened at the office of the said company in the city of Chariton, Lucas county, Iowa, in pursuance of the following notice, to wit:

Stockholders' Meeting.

"Public notice is hereby given that the annual meeting of the stockholders of the Fitzgerald & Mallory Construction Company will be held at the office of the company, in the city of Chariton, Iowa, on Wednesday, April 17th, 1889, at 2 o'clock p. m. Said meeting is for the purpose of electing five directors of said company and for the transaction of such other business as may legally come before said meeting.

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S. H. MALLORY, *President.*
S. S. KING, *Sec'y.*"

Thereupon, on motion, Mr. S. H. Mallory was elected chairman of said meeting, and Mr. S. S. King was duly elected secretary; and thereupon it was ascertained that the following stockholders were present in person or by proxy, to wit:

S. H. Mallory (in person)	1,200 shares.
John Fitzgerald (in person)	1,200 "
Jay Jould (by B. P. Waggener, proxy)	4,000 "
H. G. Marquand (by B. P. Waggener, proxy)	1,000 "
Geo. J. Gould (by W. B. Barger, proxy)	500 "
Sidney Dillion (by B. P. Waggener, proxy)	1,000 "
Russell Sagé (by B. P. Waggener, proxy)	2,700 "
Morton, Bliss & Co. (by B. P. Waggener, proxy)	2,000 "
I. & S. Wormser (by B. P. Waggener, proxy)	500 "

The same being more than four-fifths of all the stock of said company.

Thereupon, on motion, the reading of the minutes of the last meeting was dispensed with.

On motion of B. P. Waggener, seconded by John Fitzgerald, the said meeting proceeded to the election of five directors of this company for the ensuing year; and thereupon B. P. Waggener nominated R. J. Cross, Russell Sage, Sidney Dillion, S. H. Mallory, and Amos L. Hopkins; and, on motion, the chair appointed S. S. King and W. B. Barger tellers and ordered a ballot to be taken. A ballot was duly taken, and it was ascertained that—

R. J. Cross had received	11,700	votes.
S. H. Mallory "	14,100	"
Russell Sage "	11,700	"

Sidney Dillion received 11,700 votes.
Amos L. Hopkins " 11,700 "
John Fitzgerald " 2,400 "

Thereupon it was ascertained that the said R. J. Cross, S. H. Mallory, Russell Sage, Sidney Dillion, and Amos L. Hopkins had received a majority of all the votes cast; and, on motion duly made and seconded, they were declared elected directors of this com-
207 pany for the ensuing year.

Mr. B. P. Waggener offered the following resolution:

"Whereas on the 14th day of March, A. D. 1889, the board of directors duly passed a resolution assenting to the selection of H. L. Morrill, general manager of the St. Louis & San Francisco railway, as the third arbitrator to act with S. H. H. Clark and D. J. Thayer, heretofore selected to settle and determine all differences and controversies of every kind and nature between the Fitzgerald & Mallory Construction Company and the Missouri Pacific Railway Company: Therefore be it

Resolved, That the said action of the board of directors be, and the same is hereby, fully ratified and in all respects confirmed."

This motion was duly seconded by W. B. Barger, and then Mr. John Fitzgerald made the following objection to the motion:

"Mr. Chairman, I oppose that resolution on the ground that Mr. Morrill is not a disinterested man. As the third man to be chosen was to be a disinterested party, I oppose that motion."

"Mr. Chairman, I further object to that motion on the ground that it was decided that if the two men appointed (Mr. Clark and Mr. Thayer) did not agree, that they were to choose a third party."

No further remarks being made, the chair ordered that a vote be taken on the motion.

Mr. B. P. Waggener (as proxy) voted 11,200 for it.
Mr. Barger (as proxy) voted 500 for it.
Mr. Fitzgerald voted 1,200 against it.
Mr. Mallory voted 1,200 against it.

The majority being in favor of the motion, it was carried.

Mr. Waggener next offered the following resolution:

"Whereas the board of directors has heretofore by resolution duly passed appointed M. T. Frame, Esq., of Atchison, Kansas, as attorney for the Fitzgerald and Mallory Construction Company, with authority to appear in all cases pending or which might there-
208 after be instituted in any of the courts, State or Federal, in either the State of Kansas or the State of Nebraska, in which the Fitzgerald & Mallory Construction Company was a party or might be interested: Therefore be it

"Resolved, That the action of the board of directors in the appointment of said M. T. Frame, Esq., be, and the same is hereby, in all respects fully confirmed and ratified, and the authority of M. T. Frame to enter the appearance of this company in all such litigation is fully confirmed, and said M. T. Frame is hereby fully authorized to act for this company, and all acts of his for said company are hereby ratified."

This motion was seconded by Mr. W. B. Barger. Mr. Fitzgerald made the following objection to the motion:

"Mr. Chairman, I oppose that motion, because Mr. Frame is connected with the Missouri Pacific Railway Company and not suitable to be in the position, as stated in the motion, and being interested against the Fitzgerald & Mallory Construction Company."

No further remarks being made, the chair ordered a vote to be taken on the motion.

Mr. Waggener (as proxy) voted 11,200 votes for it.

Mr. Barger (as proxy) voted 500 votes for it.

Mr. Fitzgerald voted 1,200 votes against it.

Mr. Mallory voted 1,200 votes against it.

The majority being in favor of the motion, it was carried.

Mr. B. P. Waggener next offered the following resolution:

"Whereas, on application of George J. Gould, the district court of Atchison county, State of Kansas, has appointed L. M. Briggs, of Atchison, Kansas, receiver of the Fitzgerald & Mallory Construction Company, with authority to take possession of all the assets of said company; and

Whereas said L. M. Briggs has duly qualified and the great majority of the assets of said company are now in the States
209 of Kansas and Colorado, and are in danger of being lost unless immediate attention be given to the preservation of the same; and

Whereas, in order that L. M. Briggs, as such receiver, may properly and in all things discharge the duties of his said trust, it is necessary that we should have a full and complete list and schedule of all the assets of said company and access to the books thereof:

Therefore be it resolved, That the president and secretary be, and they are hereby, instructed to deliver to said receiver—

First. All the books, records, and papers belonging to this company.

Second. All evidences of debt, bills, notes, contracts, certificates of stock held by this company in any other company or corporation.

Third. A list and schedule of all assets of said company so far as known to the president or secretary or either of them."

This motion was seconded by Mr. Barger. Mr. Fitzgerald made the following objection to the motion:

"Mr. Chairman, I object to the adoption of that resolution on the ground that it was not necessary to appoint a receiver. I further object to it as it is doubtful as to the legality of the appointment."

As no further remarks were made, the chair ordered that a vote be taken on the motion.

Mr. Waggener (as proxy) voted 11,200 for it.

Mr. Barger (as proxy) voted 500 for it.

Mr. Fitzgerald voted 1,200 against it.

Mr. Mallory voted 1,200 against it.

The majority being in favor of the motion, it was carried. Mr. Fitzgerald next offered the following resolution:

"Be it resolved, That — Mr. Waggener has in his possession a certi-

fied copy of the records of the directors' meeting of the construction company held in New York city, he leave the same with
210 secretary of the company, Mr. King, to spread on the records of the construction company as quickly as possible and then returned to Mr. Waggener where he may direct."

This motion is seconded by Mr. Fitzgerald. Mr. Waggener objects to this motion because it assumes that he has in his possession a certified copy of such record without it appearing as a matter of fact before this stockholders' meeting that he has such record.

(Mr. FITZGERALD:) "Mr. Chairman, I would like to ask Mr. Waggener if he has these papers in his possession."

Mr. Waggener answers by stating that he is not on the witness stand and declines to be interrogated.

No further remarks being made, the chair orders a vote to be taken on that motion.

Mr. Waggener (as proxy) votes 11,200 against it.

Mr. Barger (as proxy) votes 500 against it.

Mr. Mallory votes 1,200 for it.

Mr. Fitzgerald votes 1,200 for it.

The majority appearing against it, the resolution is lost.

Mr. Waggener offers the following motion:

"Resolved, That it is the sense of this meeting that it is to the interest of this company to concur in the proceeding in Kansas, wherein a receiver was appointed, and that the officers of this company be, and they are hereby, instructed to render to said receiver all assistance in their power in collecting together and preserving the assets of this company."

Seconded by Mr. Barger.

Mr. Fitzgerald objects to the motion on the ground that for the past two years the majority of the stockholders have prevented the officers from doing their work, and, further, because there is no necessity for a receiver.

No further remarks, the chair ordered that a vote be taken on the motion.

211 Mr. Waggener (as proxy) votes 11,200 for it.

Mr. Barger (as proxy) votes 500 for it.

Mr. Fitzgerald votes 1,200 against it.

Mr. Mallory votes 1,200 against it.

Mr. Mallory here explains his vote in the following:

"I wish to explain my vote. I agree with the main part of the resolution, that something should be done to preserve the assets of the company in Kansas and Colorado, and that the officers of the company have been prevented from doing so by a majority of the stockholders. I would be in favor of the resolution if the stockholders would settle up the liabilities of the company. As that has not been so, I will have to vote against it."

The majority being in favor, the motion is carried.

On motion, meeting adjourned *sine die*.

I certify the above to be a true copy of the minutes of the meeting of stockholders held this April 17th, 1889.

(Signed) S. S. KING, *Sec'y*.

NEW YORK CITY, *May 11th*, 1889.

Pursuant to call, a meeting of the directors of the Fitzgerald and Mallory Construction Company was held this day at the office of Messrs. Morton, Bliss & Co.

Present: Messrs. Sage, Cross, and Dillon.

On motion of Mr. Sage, Mr. Dillon was elected chairman of the meeting and Mr. Otteson secretary.

The secretary read the certificate of the election of Messrs. R. J. Cross, Sidney Dillon, Russell Sage, S. H. Mallory, and A. L. Hopkins as directors for the ensuing year.

Owing to the absence of Messrs. Hopkins and Mallory the meeting was adjournd to Thursday, May 16th, at 12 o'clock noon, to meet at the office of Messrs. Morton, Bliss & Co.

J. C. OTTESON,
Secretary Meeting.

212 EXHIBIT B.

$5,002.80. LINCOLN, NEBRASKA, *July 31st*, '88.

Ninety days after date, for value received, I promise to pay to the order of the First National Bank of Lincoln, Nebraska, five thousand two and $\frac{80}{100}$ dollars, with interest, at the rate of ten per cent. per annum, from date until paid. Negotiable and payable at the First National Bank of Lincoln, Neb.

THE FITZGERALD & MALLORY CONST. CO.,
By S. H. MALLORY, *Pres.*

No. 40434. Due Nov. 1, 1888.

The following appeared on the back of the foregoing:

"Pay to the First National Bank of Lincoln, Nebraska, or order, waiving demand, notice of non-payment, protest, and notice of protest.

S. H. MALLORY.
JOHN FITZGERALD.

Pay John Fitzgerald or order without recourse.

JNO. R. CLARK, *Cashier.*"

$917.91. CHARITON, IOWA, *Nov.* 23, 1888.

On demand, after date, for value received, we, jointly and severally, as principals, promise to pay to the order of First National Bank of Chariton, Iowa, nine hundred seventeen dollars & $\frac{91}{100}$, with interest after date at the rate of ten per cent. per annum, and if this note is not paid at maturity we also agree to pay all reasonable attorneys' fees incurred in or attending the collection of the same, and that interest shall draw interest as principal.

THE FITZGERALD & MALLORY CON. CO.,
By H. LAMB, *Auditor.*

First National Bank.

EXHIBIT "B" 1.

$15,290.24. ST. LOUIS, *April 23rd*, 1888.

Ninety days after date we promise to pay to the order of cashier Union National Bank fifteen thousand two hundred and
213 ninety and $\frac{24}{100}$ dollars for value received. Negotiable and payable without defalcation or discount and with interest from date at the rate of seven per cent. per annum until paid.

THE FITZGERALD AND MALLORY CON. CO.
S. H. MALLORY, *Pres't.*

The following indorsements appear thereon: "Paid July 31, 1888. Union National Bank, Chicago."

On the back the following endorsement appeared: "John Fitzgerald, St. Louis. S. H. Mallory, Chariton, Ia."

No. 2.

THE FITZGERALD & MALLORY CONSTRUCTION CO.,
ST. LOUIS, Mo., *Feb'y* 23, 1888.

At sixty days' sight, with 6% interest, pay to the order of Bracey Brothers five thousand and $\frac{00}{100}$ dollars.

$5,000.00. FITZGERALD & MALLORY CON. CO.,
S. H. MALLORY, *Pres't*,
By D. J. THAYER.

To H. M. Kennedy, cashier, No. 11 Broadway, St. Louis, Mo.

The following endorsements appear thereon: Paid April 28, 1888. Union National Bank, Chicago.

The following endorsements appear on the back: "Pay to order of E. W. Ober. Bracey Brothers. E. W. Ober." "Pay J. C. Moore, ch'r, or order, for collection on account of Union Nat'l Bank, Chicago. W. C. Oakley, cashier."

No. 3.

$15,290.24. NEW YORK, *July* 25, 1888.

Sixty days after date we promise to pay to the order of J. J. P. Odel, cashier, fifteen thousand two hundred and ninety and $\frac{24}{100}$ dollars at (7) seven per cent. interest, value received.

FITZGERALD & MALLORY CON. CO.,
By S. H. MALLORY, *Pres.*

No. —. Due 9, 26.

The following endorsements appeared thereon: "Protested for non-payment at the city of St. Louis, Mo., this 26 day of Sept., 1888. George W. Blork, notary public. (Seal.)"

214 EXHIBIT "B" 4.

$15.290.24. NEW YORK, *July* 25, 1888. Int., $226.50.

Sixty days after date we promise to pay to the order of J. J. P. Odell, cashier, fifteen thousand two hundred and ninety & $\frac{24}{100}$ dollars at seven (7) per cent. interest, value received.

FITZGERALD & MALLORY CONSTR. CO.,
By S. H. MALLORY.

Endorsed: John Fitzgerald. S. H. Mallory. Pay to J. C. Moore, c's , or order, for collection, on account of Union National Bank, Chicago. W. C. Oakley, cashier. A true copy. Attest: George M. Block, notary public.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Be it known that on the twenty-sixth day of Sept., 1888, at the request of the Merchants' National Bank of St. Louis, the holder of the original promissory note, a copy of which is hereon written, I, George M. Block, notary public for the city of St. Louis, in the State of Missouri, duly commissioned and qualified for a term ending June 28, 1889, presented the same during the usual business hours, at the regular and customary place of business, cor. Broadway & Market St., in the city of St. Louis, Mo., of Fitzgerald & Mallory Constr. Co., to C. M. Lamb, the auditor of same company, and the person whom I found in charge of said place, and demanded payment there of him, which was refused.

Whereupon I, the said notary public, at the request aforesaid, have protested, and do hereby solemnly protest, against all persons and every party concerned therein, whether maker, drawer, drawee, acceptor, payer, endorser, guaranty, surety, or otherwise howsoever, against whom it is proper to protest for all exchange,
215 re-exchange, damages, interest, costs accrued and to accrue by reason of the non-payment thereof.

Thus done and protested, at the city of St. Louis aforesaid, on the 26th day of September, 1888; of all which, on the 26 day of September, 1888, I have given due notice in writing and print to the parties concerned in the manner following: To John Fitzgerald, under cover, by mail, postpaid, and addressed to him at Lincoln, Nebraska; to H. Mallory, under cover, by mail, postpaid, and addressed to him at Chariton, Iowa. Mr. C. H. Lamb informed me that John Fitzgerald's residence and place of business was Lincoln, Nebraska, and that C. H. Mallory's residence and place of business was at Chariton, Iowa, and I also gave same notice to Union Nat'l Bank, to John Fitzgerald, to S. H. Mallory by enclosing all three notices in one envelope, addressed to "Union National Bank, W. C. Oakley, cashier, Chicago, Ill.," and depositing the same in the post office at St. Louis, Mo., postage prepaid, at the hour of 5 o'clock p. m. of that day.

In testimony whereof I, the said notary public, have hereunto set my hand and affixed my notarial seal on the 26th day of Sept., 1888.

GEORGE M. BLOCK,
[SEAL.] *Notary Public, St. Louis, Mo.*

Recorded Book E; folios, 5; fee, $3.50.

STATE OF MISSOURI, }
City of St. Louis. }

Before the undersigned, a notary public within and for said city came George W. Block, who, being duly sworn, on his oath says that the statements set forth in the foregoing certificate are true.

GEORGE M. BLOCK.

Sworn to and subscribed before me this 26th day of Sept., A. D. 1888.

[SEAL.] PAUL T. COSTE,
Notary Public.

216 The following appears on the back of the foregoing: Note for $15,290.24, drawn by Fitzgerald & Mallory Con. Co. on ——, protested for non-payment 26 day of Sep., 1888. Last endorser, Union Nat'l Bank. Protest fee, $3.50.

EX. 5 OF EX. "B."

FITZGERALD & MALLORY CONSTRUCTION COMPANY,
ST. LOUIS, MO., *Feb'y 23rd*, 1888.

At sixty days' sight, with 6% interest, pay to the order of Bracey Brothers five thousand $\frac{00}{100}$ dollars.

$5,000.00. FITZGERALD & MALLORY CONSTRUCTION CO.,
S. H. MALLORY, *Pres.*,
By D. J. THAYER.

To W. M. Kennedy, cashier, No. 1 Broadway, St. Louis, Mo.

On the back of the foregoing appears the following: "Paid Apr. 28, 1888. Union National Bank, Chicago. Accepted Feb'y 25, 1888. Q. M. Kennedy, cashier."

On the back appeared the following: "Pay to order of E. W. Ober. Bracey Bros. E. W. Ober. Pay J. C. Moore, c's'r, or order, for collection, on account of Union Nat'l Bank, Chicago. W. C. Oakley, cashier."

No. 5, Ex. "B."

THE FITZGERALD & MALLORY CONSTRUCTION CO.,
ST. LOUIS, MO., *Feb'y 23*, 1888.

At sixty days' sight, with 6% interest, pay to the order of Bracey Brothers five thousand two hundred and ninety & $\frac{24}{100}$ dollars.

$5,390.24. THE FITZGERALD & MALLORY CO. CO.,
By S. H. MALLORY, *Pres.*,
By D. J. THAYER.

To H. M. Kennedy, cashier, No. 1 Broadway, St. Louis, Mo.

On the face appears the following: "Paid April 28, 1888. Union Nat'l Bank, Chicago. Accepted Feb'y 25, 188–. W. M. Kennedy, cashier."

On the back of the foregoing appeared the following: "Pay to order of E. W. Ober. Bracey Bros. E. W. Ober." "Pay J. C. Moore, c'h'r, or order, for collection, on account of Union
217 Nat'l Bank, Chicago. W. C. Oakley, cashier."

EXHIBIT "D."

$10,000. CHICAGO, *Dec.* 14, 1888.

Sixty days after date we or either of us promise to pay to the order of the Union National Bank of Chicago ten thousand dollars, at its office, with eight per cent. interest after date, with attorney's fees and costs of collection, value received.

JOHN FITZGERALD.
S. H. MALLORY.

The following endorsement appeared on the back of the foregoing: "Paid Feb. 15, 1889. Union National Bank, Chicago."

EXHIBIT "H."

Statement of Expenses During the Year 1886 *by John Fitzgerald.*

1886.	On connection with D., M. & A. contract:	
Feb'y 28.	Expense to Chariton	3 00
March 3.	" " Kansas City	2 00
	" " Newton	10 45
	Telegram	2 00
6.	Hotel at Newton	5 50
	Newton to Kansas City	10 50
18.	Chariton & return	6 00
23.	St. Louis	20 50
26.	Chicago	13 00
April 4.	"	8 50
8.	Kansas City	5 00
10.	" "	7 50
15.	" "	5 00
28.	Newton	9 00
29.	Newton to Kansas City	9 00
May 1.	Hotel, Edna	3 00
2.	Chetopa	5 50
13.	Kansas City	5 50
19.	Hotel, Chetopa	9 35
21.	" Louisville	1 00
June 8.	Kansas City	4 00
9.	Hotel, Chetopa	4 00
10.	" Coffeyville	5 00
13.	" "	10 00
	Sleeping car, K. C.	2 00
14.	" " to Lincoln	2 00

1886.			
June	14.	Hotel, Kansas City	2 00
	20.	Sleeping car, Kansas City	2 00
		" " Coffeyville	2 00
218		Hotel, Coffeyville	2 50
	21.	Team to Edna	3 00
	23.	Hotel, Chetopa	2 00
	25.	" Coffeyville	1 00
	26.	" Chetopa	2 75
	28.	" Kansas City	2 50
		Sleeping car to Lincoln	2 25
			189 80
July	21.	Sleeping car to Chetopa	2 00
		Hotel, Chetopa	2 00
	22.	" Sedan	5 00
	23.	Sedan to Chetopa	3 00
Aug.	1.	Chetopa to Conway	1 00
		Sleeping car	2 00
	2.	Hotel, Conway	2 00
	3.	Hotel, Kingman	5 00
	4.	Hotel, Wichita	1 00
	5.	Hotel, Conway	1 00
		Sleeping car to K. City	2 00
		Hotel, Wichita	1 00
		Sleeping car, K. City (2)	4 00
		R. R. fare to Pac. J'n to K. City	10 60
		Hotel, Kansas City	1 50
	13.	Hotel, Chetopa	1 50
	14.	Hotel, Coffeyville	3 00
	23.	Sleeping car to K. City	4 00
		Hotel, K. City	1 50
	27.	Hotel, Coffeyville	5 00
	28.	Hotel, Chetopa	2 00
		Sleeping car to Wichita	2 00
	29.	Hotel, Wichita	2 00
	30.	Hotel, Kingman	2 10
Sep.	1.	Hotel, Wichita	6 60
		R. R. fare, Oswego to Chetopa	25
		Hotel, Chetopa	2 50
	2.	Sleeping car to Chetopa to K. City	2 00
		Sleeping car, K. City to Lincoln	2 50
Oct.	29.	Chicago	7 00
	31.	For sleeping car to New York	28 50
Nov.	1.	Hotel, New York	15 50
	8.	Sleeping car, St. Louis to Lincoln	3 00
	23.	Wichita from Lincoln	9 00
		Hotel, Wichita	6 50
		R. R. fare to Winfield	1 15

1886.			
Nov.	23.	Livery	10 00
	29.	Hotel, Coffeyville	2 00
			355 00
Dec.	3.	Hotel, Wichita	6 00
		R. R. fare to Winfield	1 15
	4.	Hotel, Wichita	75
		Expenses on line	11 00
	5.	Hotel, Chetopa	75
		Sleeping car to K. City	2 00
		Sleeping car, K. City to Lincoln	2 00
	17.	Hotel, Kansas City	1 00
		Hotel, Chetopa	1 00
	18.	Livery, Sedan	3 50
	19.	Hotel, Sedan	1 00
	19.	Livery, Wauneta	2 50
		Hotel, Wauneta	1 00
	21.	Hotel & livery, Cedarville	3 00
		Livery, Wauneta	75
Dec.	22.	Hotel, Cedarville	1 25
	23.	Supper, Kansas City	1 00
		Sleeping car, K. City to Lincoln	2 00
			396 65

219 No. 5188. October, 1888.

Form 1. H. T. D., 10, 6, '86, 1 M.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

188–.

For expenses incurred during the year 1886 in connection with the D., M. & A. R. R. contract, as per statement attached $396 65

Cons'tn ac. 12, general.

AUDITOR'S OFFICE.

Examined & entered.

C. M. LAMB, *Auditor.*

I certify the above account to be correct.

JOHN FITZGERALD.

Approved: —— ——, *President.*

Received —— —, 1888, from the Fitzgerald & Mallory Construction Company, three hundred and ninety-six $\frac{65}{100}$ dollars in full settlement of above account.

—— ——.

[On the margin.]

Approved: D. J. THAYER,
General Manager and Chief Eng'r D., M. & A. R'y.

N. B.—The above receipt must be dated and signed by the party in whose favor this voucher is made. If signed by another party, the authority for so doing must in all cases be attached to the voucher.

Persons signing by mark must have witness to their signature. One person signing for another must write the full name and not the initials of the person signing.

Witness to signature:
—— ——.

[Endorsed:] 188–. Voucher No. 5188. Fitzgerald & Mallory Construction Company in favor of John Fitzgerald, Lincoln, Neb. $396.65.

Charged to—

1. Surveying and engineering
2. Right of way and depot grounds
3. Grading
4. Bridging and masonry
5. Cross-ties
6. Switch ties
7. Iron rails
8. Steel rails
9. Rail fastenings
10. Frogs and switches
11. Track laying and surfacing
12. Buildings
13. Telegraph
14. Fencing
15. General expenses
16. Legal expenses
17. Miscellaneous

Equipment

220 Recorded to October, 188–.

Form 102.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Nebraska.

1888.

For expenses incurred during the year 1886 in connection with the D., M. & A. R. R. contract, as per statement attached $396 65

Account.	No.	Amount.		
Const'n ac., gen'l	12	396 65	Bill correct.	Calculations correct.

Approved: D. J. THAYER, *Engineer.* Approved: C. M. LAMB, *Auditor.* Approved: S. H. MALLORY, *President.*

Received —— —, 188–, from the Fitzgerald & Mallory Construction Company, contractors D., M. & A. R'y, three hundred and ninety-six & $\frac{65}{100}$ dollars in full payment of above account.

—— ——.

[Written across the face:] Duplicate.

[On the margin.]

Approved: —— ——.

[Endorsed:] Duplicate. Fitzgerald & Mallory Construction Company, contractors D., M. & A. R'y. Voucher. $396.65, in favor of John Fitzgerald—address, Lincoln, Neb.—for expenses month of October, 1888. Distribution of accounts. Total, $—.

Distribution of Account.

Bridging and masonry
Buildings
Cross-ties
Cattle-guards & road crossings
Frogs and switches
Grading
General expenses
Legal expenses
Steel rails
Surveying and engineering
Switch ties
Spikes
Splices
Track bolts
Track laying and surfacing
Right of way & depot grounds
Telegraph
Fencing
Stationery
Equipment

221 EXHIBIT "I."

THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY,
ST. LOUIS, MO., *March* 3, 1888.

At five days' sight pay to the order of First National Bank at Chariton, Ia., ten thousand dollars $\frac{00}{100}$, care of R. I. Cross, treas.

$10,000.00. THE FITZGERALD & MALLORY CON. CO.,
By S. H. MALLORY, *Pt.*

To Morton, Bliss & Co., New York, N. Y.

The following endorsement appeared on the face of the foregoing: "Cancelled Apr. 20, 1888. D. J. Thayer, gen. manager. W. M. Kennedy, cashier.

No. 2.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
ST. LOUIS, MO., *March* 3, 1888.

At ten days' sight pay to the order of the First National Bank of Chariton, Ia., ten thousand dollars, care R. I. Cross, treas.
$10,000.00. THE FITZGERALD & MALLORY CON. CO.,
By S. H. MALLORY, *P't.*

To Morton, Bliss & Co., New York city, N. Y.

The following endorsement appeared on the face of the foregoing: "Cancelled April 20, 1888, by order of D. J. Thayer, gen. manager. W. M. Kennedy, cash."

No. "3."

THE FITZGERALD & MALLORY CONSTRUCTION CO.,
ST. LOUIS, MO., *March* 3, 1888.

At fifteen days' sight pay to the order of First Nat'l Bank of Chariton, Ia., ten thousand $\frac{00}{100}$ dollars, care of R. I. Cross, treas.
$10,000.00. THE FITZGERALD & MALLORY CO.,
By S. H. MALLORY, *P't.*

To Morton, Bliss & Co., New York city, N. Y.

The following endorsements appeared on the back of the foregoing: "Cancelled Apr. 20, 1888, by order of D. J. Thayer, gen. manager. W. M. Kennedy, cashier."

222 No. "4."

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
ST. LOUIS, MO., *March* 3, 1888.

At three days' sight pay to the order of the First National Bank of Chariton, Ia., ten thousand dollars, care of Richard I. Cross, treas.
$10,000.00. THE FITZGERALD & MALLORY CON. CO.,
By S. H. MALLORY, *P't.*

To Morton, Bliss & Co., New York city, N. Y.

The following endorsement appeared on the back of the foregoing: "Cancelled April 20, 1888, by order of D. J. Thayer, gen. manager. W. M. Kennedy, cash'r."

EXHIBIT "J."

THE FITZGERALD & MALLORY CONSTRUCTION CO.,
ST. LOUIS, MO., *April 28th*, '88.

On demand, pay to the order of S. H. Mallory five thousand five hundred and $\frac{00}{100}$ dollars, with interest at the rate of ten (10) per cent. per annum.

$5,500.00. THE FITZGERALD & MALLORY CON. CO.,
By C. M. LAMB, *Auditor.*

To the F. & M. Con. Co., St. Louis, Mo.

The following appeared on the face: "Accepted payment at First National Bank, Chariton, Iowa. S. H. Mallory, president."

The following appeared on the back of the foregoing: $3,712.00. Paid July 30, 1888. "S. H. Mallory."

EXHIBIT "K."

$5,000. CHARITON, IOWA, *July* 30, 1888.

On demand after date, for value received, we jointly and severally, as principals, promise to pay to the order of the First National Bank of Chariton five thousand dollars, at its banking-house in
223 Chariton, Iowa, with interest after date at the rate of ten per cent. per annum, and if this note is not paid at maturity we also agree to pay reasonable attorney fees incurred in or attended — the collection of the same, and that interest shall draw same rate as principal.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
By C. M. LAMB, *Auditor.*

Number 21782. Amount, $5,000, due demand.

The following endorsement appeared on the back of the foregoing: Int. paid to Oct. 1, '88; int. paid to Nov. 23, '88. S. H. Mallory. First National Bank, Chariton, Iowa. F. R. Crorkn, cash'r.

EXHIBIT "L."

Statement of Expenses During Year 1887, *by John Fitzgerald.*

1887.	In connection with D., M. & A. contract:	
Jan'y 27.	Expense to Wichita	3 00
Feb'y 3.	Hotel, Wichita	15 50
	Sleeping car, Wichita to K. City	2 00
	Expense to Lincoln	2 00
17.	Sleeping car to Wichita	2 00
21.	Hotel, Wichita	5 50
	Hotel, Winfield	50

1887.			
Feb'y	21.	Sleeping car to Topeka	2 00
	25.	Expenses, Winfield to Lincoln	12 00
Mar.	31.	" Lincoln to Winfield	2 75
		Expense, Winfield	3 00
April	4.	Winfield to McCracker	6 75
	5.	Utica to McCracker	2 00
	6.	McCracker	5 00
	7.	R. R. fare, McCracker to G. Bend	3 00
Sept.	16.	Expense, Lincoln to Chicago	25 50
	17.	Chicago to New York	57 00
	23.	From New York to Chicago	33 00
		Hotel, New York	50 00
		Sleeping car	5 00
			227 50

224 No. 5189. October, 188–.

Form 1. H. T. D., 10, 6, '86, 1 M.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

188–.

For expenses incurred during the year 1887 in connection with the D., M. & A. R. R. contract, as per statement attached ---------- 227 50

Const'n ac. 12, general.

AUDITOR'S OFFICE.

Examined and entered.

C. M. LAMB, *Auditor.*

I certify the above account to be correct.

JOHN FITZGERALD.

Approved: —— ——, *President.*

Received —— —, 188–, from the Fitzgerald & Mallory Construction Company two hundred and twenty-seven & $\frac{50}{100}$ dollars in full settlement of above account.

[On the margin.]

Approved: D. J. THAYER,
General Manager and Chief Eng'r D., M. & A. R'y.

N. B.—The above receipt must be dated and signed by the party in whose favor this voucher is made. If signed by another party the authority for so doing must in all cases be attached to the voucher.

Persons signing by mark must have witness to their signature.

One person signing for another must write the full name and not the initials of the person signing.

Witness to signature:

——— ———.

[Endorsed:] 188–. Voucher No. —. Fitzgerald & Mallory Construction Company in favor of ——— ———. $—.

Charged to—

1. Surveying and engineering
2. Right of way and depot grounds
3. Grading
4. Bridging and masonry
5. Cross-ties
6. Switch ties
7. Iron rails
8. Steel rails
9. Rail fastenings
10. Frogs and switches
11. Track laying and surfacing
12. Buildings
13. Telegraph
14. Fencing
15. General expenses
16. Legal expenses
17. Miscellaneous
Equipment

225 Duplicate. Recorded in October, 188–.

Form 102.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

1888.

For expenses incurred during the year 1887 in connection with the D., M. & A. contract, as per statement attached 227 50

Account.	No.	Amount.	
Const. ac.	12	227 50	Bill correct. Calculations correct.

Approved: D. J. THAYER, *Engineer.* Approved: C. M. LAMB, *Auditor.* Approved: S. H. MALLORY, *President.*

I certify the above account to be correct.

——— ———.

Approved: ——— ———, *President.*

Received ——— —, 188–, from the Fitzgerald & Mallory Construction Company, contractors D., M. & A. r'y, five hundred twenty-seven $\frac{50}{100}$ dollars, in full payment of the above account.

——— ———.

[On the margin.]

Approved: —— ——.

[Written across the face:] Duplicate.

[Endorsed:] Duplicate. Fitzgerald & Mallory Construction Company. Voucher. $227.50, in favor of John Fitzgerald—address, Lincoln, Neb.—for expenses month of October, 1888. Distribution of accounts. Ex. "I."

Distribution of Account.

Bridging and masonry
Buildings
Cross-ties
Cattle-guards & road crossings
Frogs and switches
Grading
General expenses
Legal expenses
Steel rails
Surveying and engineering
Switch ties
Spikes
Splices
Track bolts
Track laying and surfacing
Right of way & depot grounds
Telegraph
Fencing
Stationery
Equipment

226 Ex. 1 M.

$856.64. ST. LOUIS, *June 16th*, 1888.

120 days after date we promise to pay to the order of M. S. Cartler & Co. eight hundred and fifty-six and $\frac{64}{100}$ dollars, for value received, payable at the Merchants' Bank, St. Louis, with interest from date at the rate of seven per cent. per annum until paid.

In THE FITZGERALD & MALLORY
CONSTRUCTION COMPANY,
S. H. MALLORY, *Pres't.*

The following endorsement appears on the face of the foregoing: "Protested for non-payment on demand from —— ——, of Merchants' Bank at St. Louis, Mo., this 17 of Oct., 1888.
Fees, $3.00.

PAUL F. COSTE,
Notary Public, City of St. Louis, Mo.

The following endorsement appeared on the back of the fore-

going: "S. H. Mallory, M. S. Catter & Co., M. S. Catter. W. S. Catter, att'y. Pay First Nat'l Bank, or order, for collection, on account of Bank of Commerce, St. Louis. Protest waived. Report by No. 692. J. C. Van Blarcom, cash'r."

M. 2.

169,536, Oct. 17.
20.50 int.

856.64. ST. LOUIS, *June 16th*, 1888.

20 days after date we promise to pay to the order of M. S. Catter & Co. eight hundred & fifty-six and $\frac{64}{100}$, with interest from date at the rate of seven per cent. per annum until paid.
No. —. Due —.

For FITZGERALD & MALLORY
CONSTRUCTION CO.
S. H. MALLORY, *Pres't.*

Endorsed: S. H. Mallory, M. S. Cartter & Co., M. S. Cartter. W. S. Cartter, att'y.

A true copy.
Attest: PAUL F. COSTE,
Notary Public.

227 STATE OF MISSOURI } ss:
City of St. Louis, }

Be it known that on the 17th day of October, 1888, at the request of the holder of the original promissory note, a copy of which is hereto written, I, Paul F. Coste, notary public for the city of St. Louis, in the State of Missouri, duly commissioned and qualified for a term ending June 29, 1889, presented the same during the usual business hours at the regular and customary place of business in the city of St. Louis, Mo., of the Merchants' Bank, S. L., to the paying teller thereof, the person whom I found in charge of said place, and demanded payment thereof of him, which was refused.

Whereupon I, the said notary public, at the request aforesaid, have protested and do hereby solemnly protest against all persons and every party concerned therein, whether as maker, drawer, drawee, acceptor, payer, endorser, guaranty, surety, or otherwise howsoever, against whom it is proper to protest for all exchange, re-exchange, damages, interest, and costs accrued and to accrue by reason of the non-payment thereof.

Thus done and protested, at the city of St. Louis aforesaid, on the 17th day of October, 1888, of all of which on the 18 day of October, 1888, I have given due notice in writing and print to the parties concerned in the manner following: To S. H. Mallory, to M. S. Cartter & Co., and to M. S. Cartter (M. S. Cartter, att'y), by enclosing all in one envelope addressed to M. S. Cartter, Chariton, Iowa, W. S. Cartter, att'y, and depositing the same in the post office at St. Louis, Mo., postage prepaid, at the hour of — o'clock p. m. of that day.

In testimony whereof I, the said notary, have hereunto set my hand and affixed my notarial seal on the 18 day of October, 1888.

[SEAL.] PAUL COSTE,
Notary Public, St. Louis, Mo.

Recorded Book H, folio 214. Fee, $3.00.

228 STATE OF MISSOURI, }
City of St. Louis. }

Before the undersigned, a notary public within and for said city, came Paul F. Coste, who, being duly sworn, on his oath says that the statements set forth in the foregoing certificate are true.

PAUL F. COSTE.

Sworn and subscribed before me this 18th day of October, A. D. 1888.

VALLE REYBURN,
Notary Public.

On the back of the foregoing appeared the following:

"From note for $556.64 drawn by Fitzgerald & Mallory Construction Co. Protested for non-payment 17 day of October, 1888. Last endorser, M. S. Cartter.

Protest fee, $3.00.

229 Form 1. H. T. D., 10, 6, '86, 1 M.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to D. F. Holman, Dr.—address, Chicago, Ill.

188–.

For royalty on "Moore track-laying machine" for track laid in Kansas from east line of Cowley county to Eaton station during May & June, 1887, 21 miles, @ $16.00 ... 336 00

I certify the above account to be correct.

JOHN FITZGERALD.

Approved: S. H. MALLORY, *President.*

Received —— —, 188-, from the Fitzgerald & Mallory Construction Company three hundred & thirty-six dollars, in full settlement of above account.

—— ——.

N. B.—The above receipt must be dated and signed by the party in whose favor this voucher is made. If signed by another party the authority for so doing must in all cases be attached to the voucher.

Persons signing by mark must have witness to their signatures. One person signing for another must write the full name and not the initials of the person signing.

Witness to signature:

—— ——.

/

OUR BEST REPRODUCTION POSSIBLE

Due To

CONDITION OF ORIGINAL

[On the margin.]

Approved: D. J. THAYER,
General Manager and Chief Eng'r D., M. & A. R'y.

[Endorsed:] 188–. Voucher No. —. Fitzgerald & Mallory Construction Company in favor of —— ——. $—.

Charged to—

1. Surveying and engineering
2. Right of way and depot grounds
3. Grading
4. Bridging and masonry
5. Cross-ties
6. Switch ties
7. Iron rails
8. Steel rails
9. Rail fastenings
10. Frogs and switches
11. Track laying and surfacing
12. Buildings
13. Telegraph
14. Fencing
15. General expenses
16. Legal expenses
17. Miscellaneous
18. Engineering

May
234 23

EXHIBIT "M."

Fitzgerald & —
to Jo

LINCOLN, NEB., *June 29th*, 1888.

188–. ., No. 1 Broadway, St. Louis, Mo.

May 7. For tra ave this day remitted to D. F. Holman the sum of
struc f royalty claimed by him for use of trams.
Account. en after me so much, claiming that he could not
Co'st'g Chetopa D n from your office, that I have concluded to pay
an adjust it afterwards.

Approved:
D. J. THAY ruly,
E t JOHN FITZGERALD.

Received, —— CHICAGO, *July 2nd*, 1888.
tion Company, c
in full paymen *G* of the 28th ult., enclosing draft for $336.00, is
you for the same. I am pleased to get the
[Written :] Fitz nclose herewith a receipt.
o. 5191. remain,
ncoln, Neb ly,
Appants. J. F.
D. F. HOLMAN.

231 Duplicate. Recorded in October, 1888.

Form 102.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

188–.

May 13th. For services during the year 1885 and to May 1st, 1886, in working up the contract with D., M. & A. R. R. and looking after the construction of road from Belle Plaine to Kingman ---------- 5,000 00

Amount. No. Amount.

Co'ster. ac., general. 12. —— Bill correct. Calculations correct.

Approved: L. J. THAYER, *Engineer.* Approved: C. M. LAMB, *Auditor.* Approved: —— ——, *President.*

Received —— —, 188–, from the Fitzgerald & Mallory Construction Company, contractors D., M. & A. R'y, five thousand dollars in full payment of the above account.

—— ——

[Written across the face:] Duplicate.

[On the margin.]

Approved: —— —

Gen. Manager and Chief Eng'r D., M.

N. B.—The above receipt must be dated and signed in whose favor this voucher is made; if signed by the authority for so doing must in all cases be voucher.

Persons signing by mark must have witness to One person signing for another must write the ful the initials of the person signing.

Witness to signature:

—— ——.

[Endorsed:] Fitzgerald & Mallory Constr Voucher No. 5185. $5,000, in favor of John F Lincoln, Neb.—for services month of October, ' of accounts. Ex. "C." Total, $—.

Distribution of Account.

Bridging and masonry----------
Buildings ----------
Cross-ties ----------
Cattle-guards & road crossings----------
Frogs and switches----------

Grading
General expenses
Legal expenses
Steel rails
Surveying and engineering
Switch ties
Spikes
Splices
Track bolts
Track laying and surfacing
Right of way and depot grounds
Telegraph
Fencing
Stationery
Equipment

232 Duplicate. Recorded in October, 188–.

Form 102.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

1888.
May 7. For the following tools shipped to A. & M. Construction Co. June, 1886:
175 drag-scrapers, @ $5.00 ..... 875 00
9 R. R. plows, @ $20.00 ..... 180 00
234 23 wheel-scrapers, @ $20.00 ..... 160 00

J. F.

	No.	Amount.		
Fitzgerald & ... to Jo	8	1,515 00	Bill correct.	Calculations correct.

Approved: YER, *Engineer.* C. M. LAMB, *Auditor.* Approved: S. H. MALLORY, *President.*

188–. May 7. For tra... struc...

Account. —, 188–, from the Fitzgerald & Mallory Construc-
Co's st'g Chetopa D... ntractors D., M. & A. R'y, fifteen hundred and fif-
...l payment of the above account.

Approved: D. J. THAY... —— ——.

...E the face:] Duplicate.

Received, —— [On the margin.]
...tion Company, c... —— ——,
in full payment *Gen. Manager and Chief Eng'r D., M. & A. R'y.*

[Written:] Fitzgerald & Mallory Construction Company. ...o. 5191. $1,515.00, in favor of John Fitzgerald—ad-...ncoln, Neb.—for tools month of Oct., 1888. Distribution App...unts. J. F. Total, $—.

Distribution of Account.

Bridging and masonry
Buildings
Cross-ties
Cattle-guards & road crossings
Frogs and switches
Grading
General expenses
Legal expenses
Steel rails
Surveying and engineering
Switch ties
Spikes
Splices
Track bolts
Track laying and surfacing
Right of way & depot grounds
Telegraph
Fencing
Stationery
Equipment

233 Duplicate. Recorded in October, 188–.

Form 102.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y
to John Fitzgerald Dr.—address, Lincoln, Neb.

1888.
Jan. 1st. For services as gen'l manager from May 1st, 18
to January 1st, 1888

Account.	No.	Amount.	
Const. acc.	12	3,333 28	Bill correct. Calcu

Approved: D. J. THAYER, *Engineer.* Approved: C. M. LAMB, *Auditor.* Approve S. H.

Received —— —, 188–, from the Fitzgerald & tion Company, contractors D., M. and A. R'y, thr hundred and thirty-three & $\frac{28}{100}$ dollars in full account.

[Written across the face:] Duplicate.

[On the margin.]

Approved:

——

Gen. Manager and Chief Eng'r D., M. &

[Endorsed:] Duplicate. Fitzgerald & Mallory Construction

pany. Voucher No. —. $3,333.28, in favor of John Fitzgerald—address, Lincoln, Nebraska—for salary month of Oct., 1888. Distribution of accounts. Total, $—. Ex. E 1.

Distribution of Account.

Bridging and masonry
Buildings
Cross-ties
Cattle-guards and road crossings
Frogs and switches
Grading
General expenses
Legal expenses
Steel rails
Surveying and engineering
Switch ties
Spikes
Splices
Track bolts
Track laying and surfacing
Right of way and depot grounds
Telegraph
Fencing
Stationery
Equipment

234 Duplicate. Recorded to October, 188–.

Form 102.

Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

188–.
May 7. For track-laying tram shipped to F. & M. Construction Co. on Chetopa 1,500 00

Account.	No.	Amount.	
Co'st'g Chetopa Div.	1	1,500 00	Bill correct. Calculations correct.

Approved: D. J. THAYER, *Engineer.* Approved: C. M. LAMB, *Auditor.* Approved: S. H. MALLORY, *President.*

Received, —— —, 188–, from the Fitzgerald & Mallory Construction Company, contractors D., M. & A. R'y, fifteen hundred dollars in full payment of above account.

—— ——.

[Written across the face:] Duplicate.

[On the margin.]

Approved: ——— ———,
Gen. Manager and Chief Eng'r D., M. & A. R'y.

[Endorsed:] Fitzgerald & Mallory Construction Company. Voucher. Auditor's No., 5190. $1,500.00, in favor of John Fitzgerald—address, Lincoln, Neb.—for track-laying tram month of Oct., 1888. Distribution of accounts. Ex. "G." Total, $—.

Distribution of Account.

Bridging and masonry
Buildings
Cross-ties
Cattle-guards & road crossings
Frogs and switches
Grading
General expenses
Legal expenses
Steel rails
Surveying and engineering
Switch ties
Spikes
Splices
Track bolts
Track laying and surfacing
Right of way & depot grounds
Telegraph
Fencing
Stationery
Equipment

235 Duplicate. Recorded in October, 188–.

The Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y, to John Fitzgerald, Dr.—address, Lincoln, Neb.

1888.

May 1st. Services as gen'l manager during the year 1886, to May 1st, 1887 ..... 5,000 00

Account.	No.	Amount.		
Ennth.	----	5,000.00.	Bill correct.	Calculation correct.

Oct. 2. Journal.

Approved: D. J. THAYER. Approved: C. H. LAMB. Approved: S. H. MALLORY.

Received —— —, 188–, from the Fitzgerald and Mallory Construction Co., contractors D., M. & A. R'y, five thousand dollars in full payment of above account.

[Endorsed:] Auditor's No. 5186. Series —. The Fitzgerald & Mallory Construction Co., contractors D., M. & A. R'y. Voucher. $5,000, in favor of John Fitzgerald—address, Lincoln, Neb.—for salary month of October, 1888. Distribution of accounts. Ex. D.

236 And the within and foregoing was all of the evidence offered or produced on the trial of said case; and each and all of the hereinafter-mentioned exceptions to the charges and instructions of the court, given and refused, were duly made by said defendant before the jury in said case retired or withdrew from the bar.

And the evidence being concluded, the defendant thereupon asked the court to give to the jury the following special instructions, to wit: "The jury are instructed that in the absence of an agreement the plaintiff is not entitled to any compensation for services performed, either as vice-president, treasurer, or general manager."

Which said special instruction the court refused to give, and to which action and refusal of the court the defendant at the time duly excepted.

And the court, in its general charge to the jury, stated:

"That before the 3rd day of November, A. D. 1886, there was nothing in the by-laws or proceedings of the board of directors that required the company to pay any compensation at all for services that might be rendered by any of the officers;" and thereupon the court instructed the jury as follows, namely:

"That if Fitzgerald, the plaintiff, acted as superintendent, treasurer, or general manager of said company and transacted the usual business that devolves upon such officer of such a concern as that with the knowledge and consent of the defendant, it seems to me that there would be an implied agreement on the part of the defendant company to pay what these services were reasonably worth."

(And thereupon the defendant excepted to the following part of said charge, namely: It seems to me that there would be an implied agreement on the part of the defendant company to pay what these services were reasonably worth.")

And the court, in his general charge, further stated to the jury: That on the 3rd day of November, 1886, the defendant company fixed the compensation of the general manager — $5,000.00 per annum, and before that time, as no compensation was fixed or

237 agreed upon, if Mr. Fitzgerald performed the services that usually devolved on the general manager, if he devoted his time, talents, and energies to that particular business, it seems to me that there would be an implied agreement to pay what his services in that regard were reasonably worth." (The defendant duly excepted to the following part of said instruction, namely: "If Mr. Fitzgerald performed the services that usually devolved on the general manager, if he devoted his time, talents, and energies to that particular business, it seems to me that there would be an implied agreement to pay what his services were reasonably worth.")

And in the same connection the court instructed the jury in his general charge as follows:

"So if you find that to be the case you can fix such allowance for his services from the 1st of May, A. D. 1886, to the 3rd day of November, 1886, as may from the evidence appear to be just and reasonable." (And the said defendant at the time duly excepted to the following part of said charge, namely: "You can fix such allow-

ance for his services from the 1st of May, 1886, to the 3rd of November, 1886, as may from the evidence appear to be just and reasonable.")

And the court, in its general charge to the jury, said:

"There are one or two counts in the petition for expenses incurred going to St. Louis, Kansas City, and several other places in Kansas for which the plaintiff claims he ought to have judgment.

Now, if the expenses incurred in that way were incurred by him while acting in his line of duty and were expenses necessary for him to incur in transacting his businesss it may be that there was an implied agreement if there was no express agreement on the part of the defendant to pay him whatever reasonable expenses might be incurred in going from place to place and looking after the business." (The defendant excepts to that part of the charge which reads as follows: "It may be that there was an implied
238 agreement if there was no express agreement on the part of the defendant to pay him whatever reasonable expenses might be incurred in going from place to place and looking after their business.")

And the defendant at the time requested the court to give the following special instruction to the jury:

"The jury are instructed that under the charter of the defendant the president, S. H. Mallory, had no authority to borrow money and execute the notes of the company therefor."

Which special instruction the court refused to give; to which action and refusal of the court the defendant at the time duly excepted.

And thereupon the court gave the following instruction to the jury, namely:

"If the jury find from the evidence that a by-law of the defendant company was as follows:

"In the absence of contrary instructions by the board of directors the president shall be charged with the general management of the business of the company.

"And you further find that — the operations by which the debts in question were incurred—that is to say, the building of railroads in Kansas and Colorado—the president was given entire management in building the same and in the incurring of liabilities and in paying off debts incurred, you will find that he had a right to appoint other agents, such as cashier and auditor, for the purpose of making the calculations on pay-rolls and on contracts for building said roads, and he had the power to empower any one of said agents who made such calculations upon the pay-rolls of the amount due to those who did the work on said railroad by contract or otherwise, and also to draw any checks or bills or sight drafts that might be necessary to pay the same, and if it became necessary for
239 the benefit of said company to execute promissory notes or to draw sight drafts the said president would have ample authority to do the same, and might likewise empower the cashier or the party whose duty it was to ascertain the amounts due to contractors, material men, and persons working upon the construction of said railroad or building by the construction company to draw

drafts or checks, or even make promissory notes, and that the same, if done for the company or for its use and benefit, would be binding upon the said company, unless the president received from the directors certain instructions which limit his authority in the premises."

(The defendant excepts to that part of the charge which reads as follows, namely: "And if it became necessary for the benefit of said company to execute promissory notes or to draw sight drafts the president would have ample authority to do the same;" and also excepts to the following statement in said instruction, to wit: "And might likewise empower the cashier or party whose duty it was to ascertain the amounts due contractors, material men, and persons working upon the construction of said railroad or building by the construction company to draw drafts or checks or even make promissory notes.")

The said defendant asked the court to give to the jury the following special instruction, namely:

"The jury are instructed that none of the several notes sued upon constitute any evidence of debt against the defendant company, for the reason that said S. H. Mallory, as president, and C. H. Lamb, as auditor, of said defendant company had no authority to execute the same."

Which instruction the court refused to give, and to which action and refusal of the court the defendant at the time duly excepted.

240 And the court gave to the jury the following instruction upon the request of the plaintiff, namely:

"If the jury believe from the evidence that the said S. H. Mallory, the president, was authorized to draw checks against the company, and as president was authorized as its agent to determine accounts against it, the jury would have a right to imply from these acts and recognitions of the board of directors that said Mallory had the right to execute the note or notes in question executed by him, and especially would this be the case providing the jury further find that the money thus obtained from said notes was used to pay off the indebtedness of said Fitzgerald and Mallory Construction Company."

And the said defendant thereupon duly excepted to the following part of said instruction, to wit:

"If the jury find from the evidence that S. H. Mallory, the president, was authorized to draw checks against the accounts, and as president was authorized as its agent to determine accounts against it, the jury would have the right to imply from these acts and recognitions of the board of directors that said Mallory had the right to execute the note or notes executed by him," etc.

And the court also, at the request of the plaintiff, gave to the jury the following instruction, namely:

"As to the promissory notes which were endorsed by the plaintiff and upon which he was held as endorser, if the jury find from the evidence that said notes were executed in good faith by the president of the construction company, and that the proceeds or the pro-

ceeds of the notes and drafts for which the note in question was a renewal were received by and used for the benefit of the construction company, and you further find that the plaintiff is now the holder and owner of said notes, you will find for the plaintiff in the full sum of said notes with interest."

241 (The defendant excepts to that portion of said instruction which reads as follows: "You will find for the plaintiff in the full sum of said notes with interest.")

The court also, at the request of the plaintiff, gave the following instructions:

"As to the money due on promissory notes, the jury are instructed that the law is as follows: If the money was fairly borrowed for the corporation and *that* notes were given for it and the funds *was* honestly applied in payment of pressing liabilities of the company, and after the same was done the directors individually were advised of the transaction, it would be a perversion of the plain principles of reason and judgment to permit the validity of such security to be effectually denied, and if you find the facts to be as above stated you will find for the plaintiff the full amount of said promissory note and interest."

(To all of which the defendant excepted, and especially to that part of said instruction which reads as follows: "If you find the facts to be as above set forth you will find for the plaintiff the full amount of said promissory note with interest.")

And the court also, at the request of the plaintiff, gave the following instructions to the jury, namely:

And although there may be a provision in the by-laws of said construction company requiring certain formalities in the execution of a promissory note or draft, yet that does not necessarily make such formalities essential to the ratification of the contract; and if you find from the evidence that said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors of said construction company had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, you will find that said acts of the

242 president have been fully confirmed, and you will find for the plaintiff the full amount of said notes with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them." (The defendant excepts to the following portion of said instruction, to wit: "Yet that does not necessarily make such formalities essential to the ratification of the contract entered into;" and also excepts to the following portion of said instruction: "If you find from the evidence that said notes were given for the purpose of paying off debts that were due by said construction company, and that the directors of said construction company had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, you will find that said acts of the president have been fully confirmed;" and also excepts to the following portion thereof: "And you will find for the plaintiff the full amount of said notes with interest, provided you

find that the plaintiff was the owner of the same and is now the holder of them.")

The court instructed the jury that the first part of the third cause of action as amended, wherein the plaintiff claimed judgment for $5,000.00 for work and labor performed by him for the promoters of the Fitzgerald & Mallory Construction Company from May 1st, 1885, to May 1st, 1886, should be disregarded and disallowed by the jury.

The court also instructed the jury to find for the defendant as to the 14th cause of action, being for $5,000.00, and excluded that count and sum from the consideration of the jury.

And the said defendant asked the court to give to the jury the following special instruction, to wit:

The jury are instructed that if they find from the evidence that original service of summons was made on S. H. Mallory, as president, as a result of a trick, under which said Mallory was
243 induced to come into the State of Nebraska, and said fact was concealed from the said defendant by said plaintiff until on the trial of this case, then and in that event the suit was improperly brought and you should find for the defendant; which instruction the court refused to give, and to which action and refusal of the court the defendant duly excepted.

And now, on this 20th day of December, A. D. 1889, at the November term of the United States circuit court in and for the district of Nebraska for the year 1889, the defendant duly presented the within and foregoing bill of exceptions, and prays that the same may be allowed and signed as a part of the records herein; which is accordingly done in open court this Dec. 30, 1889.

Witness my hand this 30th day of December, A. D. 1889.

(S'g'd) ELMER S. DUNDY, *Judge.*

Ordered that pl'ff present proposed amendments to the foregoing bill in ten days from this date if he shall desire to present any proposed amendments.

20 Dec., 1889.

(S'g'd) ELMER S. DUNDY.

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 340, M. U. S. circuit court, district of Nebraska. John Fitzgerald *vs.* The Fitzgerald and Mallory Construction Company. Bill of exceptions. Filed Dec. 30, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 30th day of December, 1889, a writ of error was issued and filed in said case, of which the following is the original:

244 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court, before you, between John Fitzgerald, plaintiff, and The Fitzgerald & Mallory Con. Co., defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 30th day of Dec., 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 340, M. United States circuit court, district of Nebraska. The Fitzgerald and Mallory Construction Co., pl'ff in error, *vs.* John Fitzgerald, defendant in error. Writ of error. Filed Dec. 30, 1889. Elmer D. Frank, clerk.

245 UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

Pursuant to the foregoing writ of error and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios from 1 to 245 contain true and faithful transcripts from the records and files of said court in the case of John Fitzgerald *vs.* The Fitzgerald and Mallory Construction Company, and that a copy of the writ of error has been lodged and remains in my office; and I do further certify that the original assignment of error and the stipulation to submit on briefs are hereto attached.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 10th day of Feb'y, A. D. 1890.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: No. 1595. Nebraska C. C. U. S. The Fitzgerald and Mallory Construction Company, plaintiff in error, *vs.* John Fitzgerald. Filed March 27, 1890.

Office Supreme Court, U. S.
FILED.
SEP 5 1890

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1,595.

THE FITZGERALD AND MALLORY CONSTRUCTION COMPANY,

Plaintiff in Error,

vs.

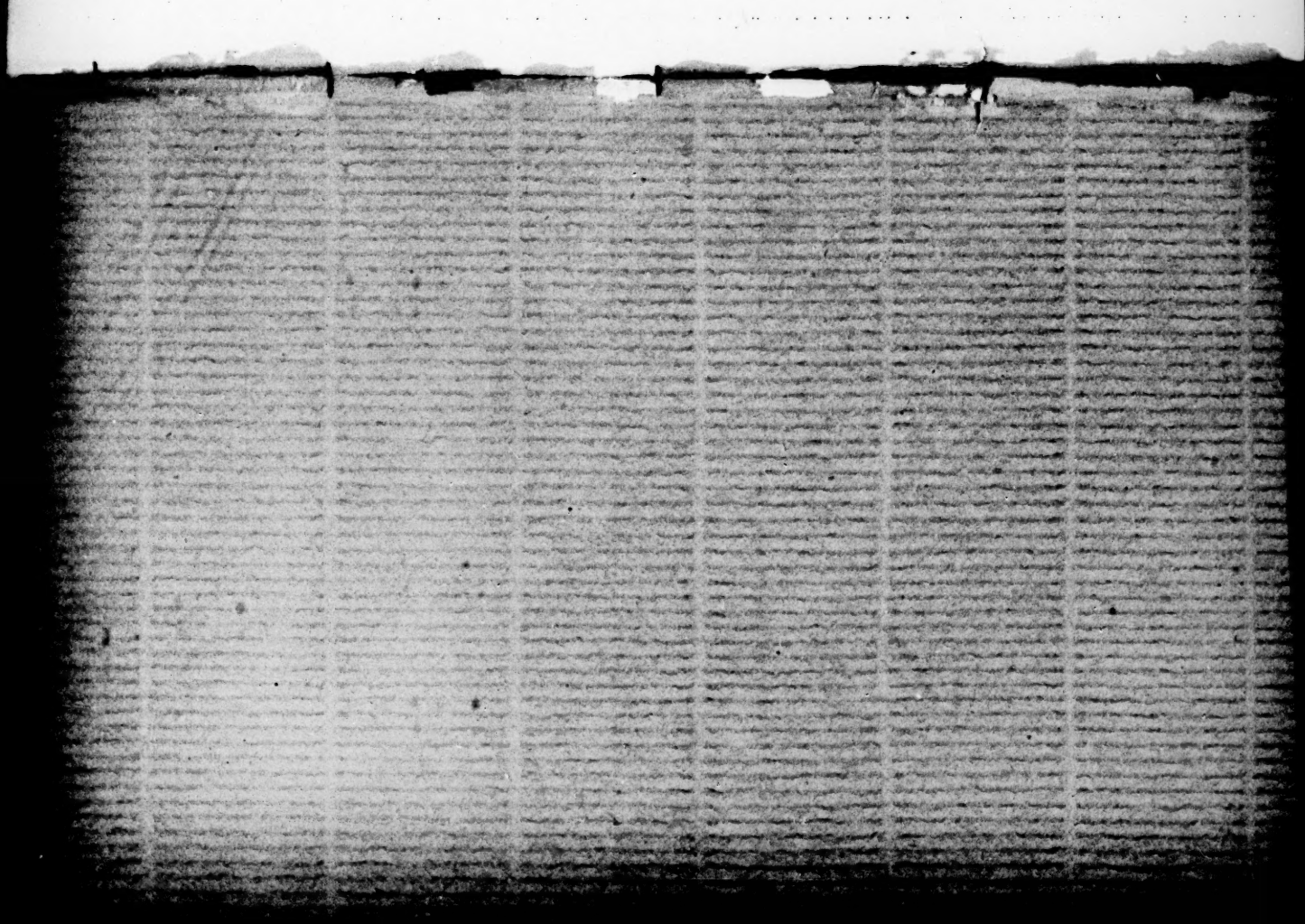
JOHN FITZGERALD,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
DAVID D. DUNCAN,
Of Counsel.

C. G. Burgoyne's Printing Business, cor. Walker and Centre Sts., N. Y.



Supreme Court of the United States,

OCTOBER TERM, 1890.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
Plaintiff in Error,

AGAINST

JOHN FITZGERALD.
Defendant in Error.

No. 1595.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This action was originally brought by plaintiff, John Fitzgerald, a citizen of Nebraska, in the District Court of Lancaster County in that State, whence it was removed into the Circuit Court of the United States for the District of Nebraska upon the petition of the defendant, The Fitzgerald and Mallory Construction Company, a corporation created under the laws of Iowa.

Plaintiff declared upon fourteen causes of action:

1st. Upon a note for $5,002.80 signed on behalf of the defendant corporation by S. H. Mallory, its Presi-

dent, payable to the order of The First National Bank of Lincoln, endorsed by plaintiff and S. H. Mallory. Plaintiff alleges he endorsed this note "without any consideration," and paid it with interest, the total being $5,128.75.

2d. A note for $15,290.24 signed on behalf of defendant by S. H. Mallory, President, payable to the order of J. J. P. Odell, cashier, endorsed by plaintiff and S. H. Mallory. Plaintiff says he also endorsed this note "without any consideration" and paid it with interest, the full sum paid being $15,468.62.

3d. For services from May 1, 1885, to May 1, 1886, as a promoter of the defendant corporation, alleging them to be worth $5,000. This claim was taken from the jury by the instruction of the Court (Tr, p. 175).

Services from May 1, 1886, to November 4, 1886, as superintendent and as treasurer of defendant, alleging their value to be $6,000.

4th. Services as general manager from November 1, 1886, to November 1, 1887, under salary, $5,000.

5th. Same for period November 1, 1887, to May 1, 1888, $2,500.

6th. Goods sold and delivered at defendant's request (drag-scrapers and railroad plows) $1,515.

7th. Goods sold and delivered at defendant's request (tracking-laying tram) as, $1,500.

8th. Money paid for personal expenses incurred at defendant's request during the year 1886, $396.65.

9th. Same for year 1887, $227.50.

10th. Balance due on a draft for $5,500, signed on behalf of defendant by C. H. Lamb, Auditor, to order of S. H. Mallory, $1,928.

11th. On note for $5,000, signed on behalf of defendant by C. H. Lamb, Auditor, to order of First National Bank of Chariton.

12th. On note for $856.64, signed on behalf of defendant by S. H. Mallory, President, to order of M. S. Cartter & Co.

13th. On note for $917.91, signed on behalf of defendant by C. H. Lamb, Auditor, to order of First National Bank of Chariton.

14th. Money paid since January 1, 1888, upon request of defendant, for legal services and advice and otherwise for defendant's benefit, $5,000. This count was withdrawn from the jury by instruction of the Court (Tr., p. 175).

The amended answer denies the authority of S. H. Mallory to make the note pleaded in the first count, and sets up the articles of incorporation of defendant concerning the duties and powers of its officers.

The same defense is made to the second count.

Denies the contract and services set up in the third count, and pleads payment.

Admits that plaintiff was employed by defendant under a salary of $5,000 for a part of the time referred to in the fourth count, namely, from November 4, 1886.

Admits liability for salary claimed in fifth count, but

alleges that plaintiff failed to render services therefor, to defendants' damage $25,000.

Denies on information and belief that plaintiff sold and delivered the property declared upon in the sixth count.

The same defense is made to the seventh count.

Denies that C. H. Lamb, auditor, had authority to make the draft set up in the tenth count, and alleges that its proceeds were divided between plaintiff and S. H. Mallory.

Denies that C. H. Lamb, auditor, had authority to make the note set up in the eleventh count, and that defendant received any benefit therefrom; alleges that S. H. Mallory, president of defendant, caused said note to be transferred to plaintiff solely for the purpose of bringing suit thereon.

Denies that S. H. Mallory had any authority to make any of the instruments of writing sued upon in this action, and alleges that plaintiff had full knowledge of such want of authority.

Denies any liability on the fourteenth count.

Alleges that the District Court of Lancaster County, Nebraska, and the Circuit Court of the United States never had or acquired any jurisdiction of the defendant or of the matters in controversy.

The aggregate amounts claimed by the plaintiff in the several causes of action was $56,438.75. The plaintiff prayed judgment only for the sum of $51,271.85, with interest. The Court instructed the jury to disregard and disallow the first part of the third cause of action as amended, wherein the plaintiff claimed judgment for $5,000 for work and labor performed by him

for the promoters of the defendant, the Construction Company, and to find for the defendant as to the fourteenth cause of action, in which $5,000 was claimed, as above stated, and to exclude that amount and sum from its consideration (Transcript, page 175). The amounts thus disallowed aggregated $10,000, which, being deducted from the amount prayed for in the petition, would leave $41,271.85 with interest, or, if deducted from the aggregate of the sums stated in the several counts, would leave $46,438.75. Upon the trial, however, the jury returned a verdict for $47,937.97 debt, and $3,474.65 interest, and judgment was entered for the sum of those two amounts, namely, for $51,412.62. The amount of the debt thus found by the verdict, without interest, was $6,666.12 in excess of the amount prayed for, and $1,499.22 in excess of the total amounts claimed in the several counts in the petition, after deducting the sums excluded by the court.

The evidence showed (Tr., pp. 107–8) that the defendant corporation had never had an office in Nebraska, and had never done any business there nor owned any property in that State; neither did it at any time have any managing agent there.

It also appeared (Tr., pp. 37, 38, 69, 108) that service of the summons in this action was obtained by means of a trick and fraudulent device whereby the president of the defendant company, Mr. Mallory, was induced to go from Iowa to the State of Nebraska, where, upon his arrival, he was immediately served with process. The fraudulent device consisted in the sending of a telegram by the plaintiff to Mallory requesting him to come over to Lincoln, Nebraska, that plaintiff wanted to see him on business (Tr., pp. 38, 108). It

further appeared that Mr. Mallory had consulted with plaintiff and his counsel in regard to the commencement and prosecution of this action (testimony of Mr. Mallory, Tr., pp. 37, 65). Immediately upon the discovery of the circumstances under which process was served defendant took every step to assert its right to a dismissal of the action by filing a plea to the jurisdiction (Tr., p. 31), a motion for nonsuit (Tr., p. 34) and a motion to dismiss (Tr., p. 34), all of which were refused by the Court. Defendant filed a special bill of exceptions expressly preserving its objections (Tr., p. 36, *et seq.*). It is shown that Mallory withheld from the defendant and its counsel all knowledge of the means by which service was made upon him as president of the defendant (Tr., p. 39). The facts were brought out upon the examiationof Fitzgerald at the trial; and in the verified plea to the jurisdiction (Tr., p. 39) it is alleged that "plaintiff and S. H. Mallory concealed from said defendant the circumstances under which said service was made, and defendant did not discover the facts until on the 21st day of June, 1889, after the trial of the cause had commenced, and had no means of discovering the facts prior to that time;" and that said Mallory, acting in concert with plaintiff, concealed the facts from the defendant (Tr., p. 40).

The evidence also shows that the plaintiff Fitzgerald was, during all the times referred to in the petition, a stockholder and director of the defendant company (Tr., pp. 126, 132, 138).

Assignment of Errors.

The plaintiff in error makes the following assignment of errors:

1. That the Court erred in overruling and denying the plea in abatement filed by the defendant to the jurisdiction of the Court.

2. The said Circuit Court erred on the trial of said case in overruling and denying the motion of the said defendant for a nonsuit.

3. The said Court erred in retaining the jurisdiction of said case when it was made to appear that the original service of process upon said defendant was the result of a trick, subterfuge and device resorted to by the said plaintiff, John Fitzgerald, for the purpose of obtaining service of a summons upon the defendant The Fitzgerald & Mallory Construction Company, a foreign corporation.

4. The said Court erred in permitting the plaintiff to prove on the trial of said case the alleged reasonable value of services performed by him while discharging the usual and ordinary duties of general manager of the Fitzgerald & Mallory Construction Company.

5. The said Court erred in permitting the witness, D. J. Thayer, over the objection and subject to the exception of the defendant, to testify that the services of said plaintiff, John Fitzgerald, were worth from $8,000 to $12,000 per year.

6. The Court erred in permitting any evidence of

the value of the services of said John Fitzgerald, as vice-president, treasurer or general manager of said company, in the absence of an express contract between him and said company.

7. The Court erred in refusing to instruct the jury, upon request of the defendant, as follows, viz. :

"The jury are instructed that in the absence of an agreement the plaintiff is not entitled to any compensation for services performed either as vice-president, treasurer or general manager."

8. The said Court erred in its general charge to the jury as follows, viz. :

"That if Fitzgerald, the plaintiff, acted as superintendent, treasurer or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant, it seems to me that there would be an implied agreement on the part of the defendant company to pay what these services were reasonably worth."

9. The said Court erred in instructing the jury in its general charge as follows, viz. :

"If Mr. Fitzgerald performed the services that usually devolve on the general manager, if he devoted his time, talents and energies to that particular business, it seems to me that there would be an implied agreement."

10. The said Court erred in its general charge to the jury as follows, viz. :

"You can fix such allowances for his services from the 1st of May, 1886, to the 3d day of November, A. D. 1886, as may from the evidence appear to be just and reasonable."

11. The said Court erred in its general charge to the jury as follows, viz. :

"It may be that there was an implied agreement, if there was no express agreement on the part of the defendant to pay him whatever reasonable expenses might be incurred in going from place to place and looking after their business."

12. And the said Court erred in refusing to give the following instructions requested by the defendant, viz. :

"The jury are instructed that under the charter of the defendant company the president, S. H. Mallory, had no authority to borrow money and execute the notes of the company therefor."

13. The said Court erred in giving the jury the following instruction, viz.:

"And if it became necessary for the benefit of said company to execute promissory notes or to draw sight drafts, the said president would have ample authority to do the same."

14. The said Court erred in giving the following general instruction to the jury, viz.:

"And might likewise empower the cashier or party whose duty it was to ascertain the amounts due contractors, material men, and persons working upon the construction of said railroad or building by the construction company to draw drafts or checks, or even make promissory notes."

15. The Court erred in refusing to give the following instruction in its general charge to the jury, viz.:

"The jury are instructed that none of the several notes sued upon constitute any evidence of debt against the defendant company for the reason that said S. H. Mallory, as president, and C. H. Lamb, as auditor, of said defendant company, had no authority to execute the same."

16. The said Court erred in giving the jury the following instruction, viz.:

"If the jury believe from the evidence that the said S. H. Mallory, the president, was authorized to draw checks against the company, and as president was authorized as its agent to determine accounts against it, the jury would have a right to imply from these acts and recognitions of the Board of Directors that said Mallory had the right to execute the note or notes in question executed by him, &c., &c."

17. The Court also erred in giving to the jury the following instruction, viz.:

"You will find for the plaintiff in the full sum of said notes, with interest."

18. The said Court erred in giving to the jury the following instruction, viz.:

"As to the money due on promissory notes the jury are instructed that the law is as follows: If the money was fairly borrowed for the corporation and *that* notes were given for it, and the fund was honestly applied in the payment of pressing liabilities of the company, and after the same was done the directors individually were advised of the transaction, it would be a perversion of the plain principles of reason and judgment to permit the validity of such security to be effectually denied, and if you find the facts to be as above stated you will find for the plaintiff the full amount of said promissory note and interest."

19. The said Court also erred in that part of the general charge to the jury as follows, viz.:

"Yet that does not necesarily make such formalities essential to the ratification of the contract entered into."

20. The said Court also erred in giving the following instruction to the jury, viz.:

"If you find from the evidence that the said notes

were given for the purpose of paying off debts that were due by said Construction Company, and that the directors of said Construction Company had full knowledge of the same and assented to the transaction—to the signing and execution of the notes—you will find that said acts of the president have been fully confirmed, and you will find for the plaintiff the full amount of said notes with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them."

21. The said Court erred in refusing to give the following instruction asked by the defendant, viz.:

"The jury are instructed that if they find from the evidence that original service of summons was made on S. H. Mallory, as president, as a result of a trick under which said Mallory was induced to come into the State of Nebraska, and said fact was concealed from the said defendant by said plaintiff until on the trial of this case, then and in that event the suit was improperly brought, and you should find for the defendant."

22. The said Court erred in rendering judgment on the verdict of the jury in favor of the plaintiff and against the defendant.

23. The said Court erred in overruling and denying motion in arrest of judgment filed by the defendant.

24. The said Court erred in overruling and denying the motion for a new trial filed by the defendant.

ARGUMENT.

I.

The Court below should have refused to proceed with the action when it was shown that the jurisdiction over defendant was obtained by means of a fraudulent device and trick.

There can be no question that if the present objection to the service of the summons had been made by motion to set it aside upon a special appearance for that purpose, it would have been promptly sustained. Such is the uniform rule.

See cases hereinafter cited.

The ground upon which the courts have founded the rule are practically two:

FIRST—*A service which is obtained by means of fraud, deceit and trickery is an abuse of legal process and incompatible with the rights and dignity of the Court whose process it is.*

In Townsend vs. Smith, 47 Wis., 623, LYON, J., said:

"If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process in an action brought against him is there served, it is an abuse of legal process, and the fraud being shown the Court will, on motion, set aside the service. * * * Such a case is entirely unlike one in which there has been a failure of proper service of process; for then the failure affects only the defendant, while here the fraud *affects the integrity of the process of the Court.*"

In Union Sugar Refinery vs. Mathiesson, 2 Clifford, 304, it was said by CLIFFORD, J.:

"Abuse of legal process in any form has always been frowned upon by courts of justice whenever and wherever the fact has been made to appear, and the party practicing it is never allowed to reap the fruits of his wrongful act."

Van Horn vs. Great Western Manufacturing Co., 37 Kan., 523, where, upon facts very similar to those in the case at bar, VALENTINE, J., said:

"Such an abuse of judicial process cannot be tolerated in any court of justice."

Snelling vs. Watrous, 2 Paige Ch., 314:

"I cannot allow a party to abuse the process or the remedial power of any Court," *per* CHANCELLOR WALWORTH.

Wanzer vs. Bright, 52 Ill., 35, *per* WALKER, J.:

"It is a firmly established rule of practice that Courts will never permit the fraudulent use of their process. And when it is attempted, the Court will promptly interfere to prevent its process from being made the instrument for effectuating the fraud, by setting it aside. It can never be tolerated that such process shall be debased for the purpose of fraud and oppression. The pure fountain of justice can never be so polluted. The courts were created for the administrations of justice, and they and their process can never be used for the purpose of oppression and to perpetrate fraud and wrong, or their process fraudulently obtained and employed to enforce a right, however, just and legal." Citing Stein vs. Valkenhuysen, 1 Ell. B. & E., 65.

Williams vs. Reed, 29 N. J. L., 385, VAN DYKE, J.:

"The question is, whether the Court should sustain this proceeding; whether this is a proper or an improper use of the court's process. I cannot suppose the courts were established for any such purpose. To aid in fraud, deceit or wrong in any form is no part of their business. To prevent and suppress all such

things is their highest duty. To permit a party to take advantage of his own wrong is what the law abhors. * * * Common justice, as well as common courtesy to our neighbors, requires that we should do to them as we would have them do to us in such cases, and that one should not permit the power of our Courts to be successfully invoked to aid in the practice of trickery, dishonesty or oppression of any kind."

The foregoing extracts (and those referred to under the next sub-head) are from opinions of the Courts in cases involving the efficacy of service, which has been procured by fraudulently enticing the defendant within the territorial jurisdiction of the several courts.

SECOND. *A legal right cannot be established by unlawful means.*

Illsley vs. Nichols, 12 Pick., 276, SHAW, Ch. J. :

"These cases, therefore, seem to establish the general principle that a valid and lawful act cannot be accomplished by any unlawful means; and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy according to the nature of the case, to restore the party injured by these unlawful means to his rights."

In Hill vs. Goodrich, 32 Conn., 590, the Court tersely said :

"We cannot do a wrong and on that build a right."

Wood vs. Wood, 78 Ky., 629 :

"It is an established principle that a valid act cannot be established by unlawful means, and that legal rights cannot be acquired by fraud, for, in the language of Lord COKE, 'it avoids all judicial acts, ecclesiastical or temporal.'" Citing Dunlap vs. Cody, 31 Iowa, 260.

Wanzer vs. Bright, 52 Ill., 35 :

"No court will take jurisdiction of a party where it

is obtained by fraud; nor is a defendant amenable to process *unless he is in or comes voluntarily within the territorial jurisdiction of the court.* Even a valid and lawful act cannot be accomplished by such unlawful means *as enticing a party by fraud to come within the jurisdiction of the court* so as to subject him to its process."

NO GENERAL APPEARANCE RESULTING FROM THE FILING OF AN ANSWER (WHICH, MOREOVER, SPECIALLY PLEADED THE WANT OF JURISDICTION IN THE COURT) CAN BE CONSTRUED AS A CONDONATION OF THE FRAUD OF WHICH THE DEFENDANT WAS THEN IGNORANT, OR AS A WAIVER OF ITS RIGHT TO A DISMISSAL OF THE SUIT UPON THE DISCLOSURE OF THE FRAUD.

The mere fact that a foreign corporation enters a general appearance to an action under the supposition that the service upon its president was regular and not procured by fraud or trickery, especially when it appears that its president, upon whom the process was served, was personally in sympathy with the plaintiff and concealed the circumstances of the service from the officers and attorneys of the corporation, cannot debar it from its right to object to the defective and fraudulent service when the facts become known to it. All of the reasons making such fraudulent service ineffective to sustain the jurisdiction are operative and apply with full force, notwithstanding such appearance.

The gross abuse of the legal process of the Court and the contempt of its rights and dignity are unaltered and unatoned for.

The further prosecution of the action is a continu-

ation of the attempt to accomplish what may be a valid and lawful purpose by unlawful and fraudulent means.

The inconvenience, disadvantage and expense attending the defense of an action by a citizen of one State in the courts of another are considerations which do not lose their significance immediately upon the service of process or at any single stage of the proceeding.

In Blair vs. Turtle, 5 Fed. Rep. 394; S. C. 1 McCreary, 372, a plea to the jurisdiction was treated as a motion to set aside the service of process obtained by fraud and deceit whereby the defendant was induced to come into the jurisdiction.

DUNDY, J., said:

"It is not believed that this right" [the right to dispute and contest the jurisdiction of the Court] "has in any manner been impaired by the defendants in their first appearance in the cause, nor during any of the subsequent stages of the proceedings."

In Townsend V. Smith, 47 Wis. 623, there was a special appearance for the purposes of a motion for an order to show course why the service of summons should not be set aside and for such other relief as to the court should seem meet. The order contained a stay of proceedings, and the court below denied the motion on the ground that the defendant by obtaining the stay had entered a general appearance and thereby waived all defects in the service. In reversing this action the Court, by LYON J., said:

"The remedy which the law affords in such a case is to set aside the process. This remedy is not given under the ground that, by reason of the fraud, the Court did not get jurisdiction of the person of the defendant by the service, but upon the ground that the Court will not exercise its jurisdiction in favor of the plaintiff who has obtained service of his summons by

unlawful means. When that fact is made to appear, *especially if the defendant has been guilty of no laches*, the court should vindicate the integrity of its process by setting aside the service and turning the plaintiff out of court as a punishment for his gross fraud.

As already observed, Courts have uniformly proceeded in such cases, and *we do not find that any Court has ever stopped to inquire, under such circumstances, whether the appearance of the defendant is general or special. * * * Surely, a general appearance to an action ought not to bar the Court from vindicating the integrity of its own process, and we have seen no case which gives that effect to a general appearance.*"

Chubbuck vs. Cleveland, 37 Minn., 466:

" Where service of process, as an attachment against the property of a non-resident, is procured by fraudulent devices, the court, *on the discovery thereof*, will refuse to exercise its jurisdiction and turn the plaintiff out of court; and the facts disclosing the fraud may be set up by answer. An appearance by answer which simply sets up facts showing want of jurisdiction, and protests against its exercise, and claims no other right, is not such an appearance as waives the objection. * * * *The law will operate retrospectively to defeat proceedings fraudulently inaugurated* though done under cover of lawful authority, and hence we see no reason why the facts may not be pleaded in an answer, on the ground that the service of process under which jurisdiction was obtained was unlawful."

The amended answer in the case at bar contained an allegation that the District Court of Lancaster County, Nebraska, from which the cause was removed to the United States Circuit Court, " never had or acquired any jurisdiction of this defendant, and this court (the United States Court) has no jurisdiction to hear, try and determine the matters and things in controversy herein " (Par. 11 of the Answer, Tr., p. 29).

The filing of a petition for the removal of a cause from a State Court to a Court of the United States, and the actual removal thereof is held not to be such an appearance as will prevent the defendant from successfully objecting to the fraudulent service of process.

Blair vs. Turtle, 5 Fed. Rep., 394; S. C., 1 McCreary, 372.

Moynahan vs. Wilson, 2 Flip., 130, where the Court, BROWN, J., said:

"Advantage must undoubtedly be taken of the defect within a reasonable time, but it does not follow that an act, which for some purposes may be considered an appearance and possibly sufficient to operate as a waiver of previous irregularities, should be considered as confirming a fraud in the service of the writ. It is a general rule for which numerous cases may be cited, that, in order to confirm a fraud the party injured must not only do some act manifesting an intention to confirm, but must be aware of the legal consequences of the act. Indeed there seems to be in cases of this class a well-settled exception to the general maxium, *Ignorantia legis neminem excusat.* * * * Without deciding how far a petition for removal is an appearance or how far a general appearance would operate as a waiver of a fraud in service of process, it is sufficient here to say that I do not think that the petition for removal is a waiver of the right of the defendant, to insist that the service of the process was procured by a fraudulent device or trick."

So also fraud in obtaining jurisdiction of the person by inducing defendant to come within the territorial jurisdiction of the Court has been held to be a good defense to an action *in another State*, upon the judgment obtained upon such service.

Dunlap vs. Cody, 31 Iowa, 260.

Duringer vs. Moschino, 93 Ind., 405.

The rulings of the court below, stated in the assignments numbered 1, 2, 3 and 21, were erroneous.

It is submitted that the case should be reversed and the cause dismissed for the errors so assigned.

II.

The Court erred in directing the jury to find for the plaintiff in the full sum of the notes with interest, notwithstanding the fact that, as to the notes declared on in the first and second causes of action, it clearly appeared that plaintiff was under no obligation whatever to pay them and was a mere volunteer.

The allegation is merely that plaintiff endorsed these notes "without any consideration." It was not alleged that the company had received the proceeds or any other benefit from these notes. Neither of them were payable to plaintiff nor does it anywhere appear that they were endorsed by him or paid by him at the request of the company or of its officers, or with their knowledge or consent.

Mr. Mallory's testimony (Tr., 70, 79) shows that the directors had no knowledge of these notes.

That one who is not obligated as surety or otherwise to pay the debt of another and who is not requested so

to do cannot acquire a right to reimbursement is well established law.

7 Daniel on Negotiable Instruments, 250.
Bishop on Contracts, Sec. 211.
Sheldon on Subrogation, Secs. 1, 240.

Durant vs. Rogers, 71 Ill., 121:

"Where the plaintiff pays money for another, not as his surety, he cannot recover the same of such person, unless it was paid at his request. * * * It is a familiar principle that one party cannot voluntarily make himself a creditor of another."

Buan vs. Lindsay, 95 Mo., 250:

"The doctrine of subrogation applies when the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights and to save his own property."

Mosher's Appeal, 56 Pa., 50, 76:

"Subrogation will not arise in favor of mere strangers, but only in favor of a party, who, on some sort of compulsion, discharges a demand against a common debtor."

To same effect, Webster and Goldsmith's Appeal, 86 Pa. St., 412.

Moran vs. Abbey, 63 Cal., 56:

"The payment of a promissory note by a third person at the request of the maker to an agent holding it for collection extinguishes the note and cannot afterwards be treated as a purchase; the obligation to pay being discharged, a subsequent transfer of the note by the payee to the person making the payment will not revive it."

And see Mine vs. Star, 8 Ore., 49.

Windsor vs. Savage, 9 Mete., 348:

"It has long been settled that the payment of a debt of another raises no assumpsit against the person whose debt is paid, and that no action will lie against

him by reason of such payment, unless his request to do it is proved."

See also Bancroft vs. Abbot, 3 Allen, 524.

All the notes and the draft described in the petition and included in the several causes of action, numbered 1, 2, 10, 11, 12 and 13, were made by the president of the defendant company, or by its auditor, without the knowledge or consent of the Board of Directors. The secretary of the company did not join in their execution. The propriety of their issue and the method of their use was determined solely by the president of the company. They were not executed in conformity with the articles of association or with the by-laws of the corporation. The articles of association in this respect are as follows:

ARTICLE FIFTH provides that

" the directors * * * shall manage the business of the corporation; they shall have power to sell, lease or mortgage all their property and lands acquired by said corporation; to issue the bonds of the same signed by the proper officers thereof for the purpose of raising money to carry on the business of the corporation and to secure the same by mortgage upon real estate, buildings and other property of the company " (Tr., p. 120).

" ARTICLE EIGHTH. All certificates of stock, contracts and bonds shall be signed by the president and secretary " (Tr., p. 120).

The by-laws enumerate the powers and duties of the president to be:

"Section 3. The president shall perform the duties that usually pertain to the duties of his office, and be the chief executive officer of the company, and in the absence of contrary instructions by the board of directors, shall be charged with the general management of the business of the company "(Tr., p. 122).

In so far as this by-law may be claimed to empower the president to make notes, drafts or other contracts without the concurrent action of the secretary, it is clearly void as contravening the articles of incorporation.

"Section 6. The treasurer * * * shall pay out money only upon the order of the president and such other officers as may be ordered by the Board of Directors" (Tr., p. 122).

Mr. Fitzgerald is not merely chargeable with constructive knowledge of the powers conferred by the charter upon the officers of the corporation and of the limitations upon them, by reason of his being a stockholder and officer of the corporation, but of actual and intimate knowledge of such powers and limitations from the fact that he was one of its promoters (Petition, Third Cause of Action, Tr., p. 6); that he signed the notice of incorporation (Tr., p. 115); and that he signed and acknowledged the Articles of Incorporation themselves (Tr., pp. 120, 121).

In the case of Head vs. Amory, 2 Cranch, 127, 177, wherein the opinion was rendered by Chief-Justice Marshall, the rule requiring that forms prescribed for the execution of contracts by corporations shall be strictly followed is pronounced with distinctness and emphasis.

See also,

Bank of Augusta vs. Earle, 13 Pet., 518, 587.
Dartmouth College Case, 4 Wheat, 636.
Badger vs. Amer. Pop. L. I. Co., 103 Mass., 244.
Salem Bank vs. Gloucester Bk., 17 Mass, 1 and 25
Railroad Co. vs. Adair, 85 Ind., 244.

III.

Plaintiff cannot recover, as upon an implied contract, for services rendered by him as a director or officer of the defendant corporation.

Plaintiff claimed (see last clause of the third cause of action, Tr. p. 6), that the defendant employed him from May 1st to November 4, 1886, to superintend the building of a railroad; and that he also acted as treasurer of defendant during the same time and incurred expense and trouble as such treasurer and superintendent or manager, and that his services in these capacities were worth the sum of $6,000, for which sum he prayed judgment under that clause. There was no proof whatever, and indeed no pretense, that defendant was liable to plaintiff for such services by virtue of any by-law of the corporation or of any express contract. No attempt was made to make any distinction between the plaintiff's services as superintendent or manager and as treasurer. The claim is upon a *quantum meruit* and covers his alleged services generally in both capacities. The testimony offered upon this claim is principally that of the witness Thayer, chief engineer of the railway company, who, in response to the question, "Do you know anything about Fitzgerald being employed by the president of this company to do any work between April 4th and November 4th, 1886," said: "I know that Mr. Fitzgerald was appointed or elected vice-president and treasurer of The Fitzgerald & Mallory Construction Company when it was organized; that he spent the greater part of his personal time dur-

ing those months on the work, and that I had occasion to consult with him frequently and bring to his attention the interest of the Railway Company towards the Construction Company, and agree with him on the mode of proceedure in certain cases. I know that he furnished money at that time because I drew drafts upon him" (Tr., p. 95). This witness also testified that plaintiff "was in charge of the construction work. He was the man that furnished funds for the Construction Company. He was the man who let contracts for grading, and represented the Construction Company in letting contracts. He furnished the men and implements to the company, sent them there and instructed them as to their duties, and notified me in regard to instructions."

The witness Lamb gave testimony to like effect (Tr., pp. 99, 100, 101).

It cannot be claimed that any of the services, as here enumerated, are foreign to or outside of those properly pertaining to the offices held at that time by the plaintiff.

The proposition introducing this branch of the argument is so well settled, and the reasoning of the Courts is so uniformly in its favor that a discussion of it is deemed entirely unnecessary. The following are the more important cases upon the point, all of which fully sustain it:

Citizens' National Bank vs. Elliott, 53 Iowa, 104.

National Bank vs. Drake, 29 Kans., 316.

Loan Association vs. Stonemetz, 39 Pa. St., 534.

Kilpatrick vs. Penroe Ferry Bridge Co., 49 Pa. St., 118.

Martindale vs. Wilson-Cass Co. (Supreme Court Penn.,April, 1890), 19 Atl. Rep., 680.
Railroad Co. vs. Ketchum, 27 Conn., 170.
Gravel Road Co. vs. Branagan, 40 Ind., 361.
Santa Clara Mining Assn. vs. Meredith, 49 Md., 389.
Illinois Linen Co. vs. Hough, 91 Ill., 63.
Commonwealth Ins. Co. vs. Crane, 6 Metc., 64.
Sawyer vs. Pawner's Bank, 6 Allen, 207.
Merrick vs. Penn Coal Co., 61 Ills., 472.
Railroad Co. vs. Miles, 52 Ill., 174.
Gridley vs. Railway Co., 71 Ill., 200.
Cheeney vs. Railroad Co., 68 Ill., 570, and cases cited below.

The mere rendering of services in such case will not raise a presumption of a contract to pay for them. No contract to pay for them can be implied.

Martindale vs. Wilson-Cass Co. (Supreme Court, Penn., April, 1890), 19 Atl. Rep., 680:

McCULLOM, J.:

"The official services of a director or president of a private corporation are rendered about its business and at its request, but he cannot recover pay for such services unless an agreement for compensation preceded them. No presumption of such agreement arises from the services. It must be proven."

Sawyer vs. Pawners's Bank, 9 Allen, 207, MERRICK, J., said:

"But the mere rendition of meritorious services is insufficient to justify a legal implication to pay for them. * * * Such officers are undoubtedly often paid for such services but always, we believe, under the sanction of some express agreement or some vote of the directors allowing or sanctioning it. In the absence of

any such provision the presumption would therefore be that the service was gratuitously performed, either in consideration of the advantages indirectly resulting from the position or from motives of generosity and public spirit. And this is according to the general rule which prevails in relation to the directors of similar corporations."

Gill vs. New York Cab Co. (1888), 48 Hun, 524, VAN BRUNT, C. J.:

"Although the services which were claimed to have been rendered by the plaintiff in this case may have been beyond that which ordinarily belonged to the office of director, and beyond the scope of the duties defined by the by-laws as belonging to the office of second vice-president, yet, from the mere fact of the rendition of those services, no presumption of a promise to pay can arise."

Kilpatrick vs. Penrose Ferry Bridge Co., 49 Pa. St., 118, WOODWARD, C. J.:

"The question was whether the plaintiff could recover on a *quantum meruit*. The salary or compensation of corporate officers is usually fixed by a by-law or by a resolution either of the directors or stockholders, but where no salary has been fixed none can be recovered."

The law on this subject is well summarized by THAYER, Ch. J., in the late case of Wood vs. Lost Lake & C. Mfg. Co. (Oregon, March, 1890), 23 Pac. Rep., 848. He said:

"From these and a great many other authorities which might be cited, it is evidently a settled rule of law that a director in a corporation acquires no legal claim against it for services performed by him in the discharge of duties pertaining to the office or trust, unless a compensation therefor was fixed by a resolution or by-laws of the corporation prior to the performance of the services, and that the auditing and approval of such a claim by the auditing officers of the corporation does not impart to it legal validity. If,

however, services are performed by such director for the corporation at its instance and request, in regard to matters outside of the duties devolving upon him by virtue of his office or trust, then he is entitled to claim compensation therefor upon a *quantum meruit*, although none had been fixed by the corporation prior to the performance thereof. The appellant in this case, therefore, had no standing in Court without proving that the compensation for the services claimed by him had been fixed by the corporation in the manner indicated before they were rendered, or that said services were not germane to the duties of his position of trust, and that he was directed by the corporation to perform them. Otherwise no legal obligation can be established against the corporation, although the services were rendered in the expectation of a remuneration therefor."

Even if it be claimed that plaintiff could have recovered for such part of his services, if any there were, as were not included in the duties which attached to his directorship or to his official position, the judgment, in so far as it is based upon the claim made in the third cause of action, cannot stand, because under the pleading and proofs there is no possibility of distinguishing between the two classes of services or of fixing the value of either of them.

The action of the Court in allowing proof of the reasonable value of the services rendered by plaintiff and in charging the jury that the law implied a contract for the payment of such services, as set forth in the assignment of errors, Nos. 4 to 10 inclusive, was clearly improper and should be reversed.

IT APPEARS ON THE FACE OF THE RECORD THAT ERROR OCCURRED IN THE ENTRY OF JUDGMENT FOR AN AMOUNT IN EXCESS OF THE TOTAL SUM CLAIMED IN THE PETITION, AS REDUCED BY THE INSTRUCTIONS OF THE COURT TO THE JURY.

As already shown in the statement, the sums claimed in the several causes of action set forth in the petition aggregate $56,438.75. The prayer of the petition was for the sum $51,271.85 and interest. On the trial the Court instructed the jury (Tr., p. 175) to disregard two of the causes of action—the 3d and 14th—in which was claimed, in all, $10,000. The jury brought in a verdict for $47,937.97, besides interest. After deducting the total sum excluded by the Court, it is manifest that the verdict exceeded the sum of the remaining causes of action by $6,666.12; and exceeded the sum prayed for, the same reduction being made, by $1,499.22.

The bill of exceptions is a part of the record, and it there appears that this objection was presented to the Court below in the motion for a new trial (Clause 5, Tr., p. 45), but was overruled.

We respectfully submit that the Court below erred in entering judgment upon the verdict so found in direct violation and disregard of its instructions, and that its action in so doing should be reversed.

JOHN F. DILLON,
DAVID D. DUNCAN,
Of Counsel.

[28074]

July 3, '90.—50.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1595.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,

Plaintiff in Error.

vs.

JOHN FITZGERALD,

Defendant in Error.

BRIEF IN REPLY.

JOHN F. DILLON,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

C. G. Burgoyne, 146-150 Centre Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1890.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Plaintiff in Error, vs. JOHN FITZGERALD, Defendant in Error.	No. 1595.

Reply to Brief for Defendant in Error.

In the brief for defendant in error we find a latitude of statement which must embarrass the consideration of the case. Counsel permits himself a free indulgence in personal comment and reflection. He discovers an aptness to mistake his own inferences for the facts of the case; and he discloses a singular confusion between the Record and foreign suggestion as sources of statement. The results of these frailties pervade the entire brief of counsel for defendant in error, and to such an extent that we may not here, with proper brevity, follow his course within and his deflections without the record. We can do little more than urge that in this case the

record has peculiar value as the authentic history of the case.

We, however, draw the attention of the Court to one or two misstatements which appear to require specific mention.

Counsel for defendant in error (Brief, pp. 17, 18) states that the clause, numbered 11, in the answer "which raises the jurisdictional question was not put there until after the evidence was all in, and under this authority (p. 114 of Record) 'before adjourning both parties were given leave to amend their pleadings to conform to the facts.'"

The record not only fails to support this statement, but establishes the fact that the plea to the jurisdiction was contained in the amended answer, filed on June 19th, 1889, pursuant to an order of Court made on the preceding day (Tr., p. 23).

The trial began with the impanelling of a jury on June 20th, 1889 (Tr., p. 31), and on the following day a special plea to the jurisdiction was filed which recited (Tr., p. 32) that "defendant did not discover the facts"—as to the service—"until on this 21st day of June, 1889, after the trial of this case had commenced, and had no means of discovering the facts prior to that time;" and that "said Mallory, acting in concert with plaintiff, concealed said facts, so that this defendant did not obtain such information until this 21st day of June, A. D. 1889." The record further shows that the general leave to both parties to amend their pleadings was granted on June 22d, 1889 (Tr., p. 104), at the close of the taking of testimony.

In the same way counsel for defendant in error (Brief, p. 51), in order to explain certain discrepancies

in amounts, intimates that the petition also was amended under the general leave to amend granted at the conclusion of the taking of testimony.

There is nothing in the record to show that the petition was ever amended. On the contrary, it appears that it was verified and filed on December 22d, 1888 (Tr., p. 12), and that on June 24th, 1889, leave was granted plaintiff to withdraw the third count (Tr., p. 35).

JURISDICTION IN REM. It is suggested by counsel for defendant in error (Brief, pp. 9, 20) that the Court below had obtained jurisdiction *in rem* by attachment and garnishment, the deduction to be drawn therefrom being that in case the service upon the person is held to be invalid and unlawful, the jurisdiction of the Court as to the property attached cannot thereby be affected. But the fallacy of this position is obvious. Even admitting that the Missouri Pacific Railway Company, the garnishee, upon which summons in garnishment was served on the 24th day of December, 1888 (*i. e.*, the same date upon which the alleged service was made upon Mallory), was indebted to the plaintiff, so that valid proceedings in garnishment would have reached actual property, such proceedings could only be made effectual by obtaining personal jurisdiction of the defendant through valid service within the State, or by publication of summons and service outside of the State, as prescribed by the Statutes of Nebraska (Compiled Statutes of Nebraska, 1889, p. 863, Sec. 78 *et seq.*). The record does not disclose the existence of either of these conditions. The only basis for the jurisdiction of the Court in the garnishment proceedings is the fraudulent serv-

ice upon Mallory, and these garnishment proceedings have, therefore, no other or different basis of jurisdiction than that upon which the general action rests. It is therefore obvious that, inasmuch as the general jurisdiction of the Court over the person of the defendant and the special jurisdiction *in rem* are based upon the same fraudulent and void service upon Mallory, the jurisdictions, both special and general, are equally defective, and neither can be invoked in aid of the other.

It is, moreover, worth while to note that there is nothing in the record showing that the Court obtained even inchoate jurisdiction *over any* RES *whatever*. In its answer the garnishee disclaims any indebtedness to the Construction Company, and alleges that upon a proper accounting between them the Construction Company would appear to be indebted to it. The record does not show that anything further was done in the garnishment proceedings, although, under the Statutes of Nebraska, the Construction Company had a right to maintain an independent action against the garnishee and to litigate the matters contained in its answer (Revised Statutes of Nebraska, p. 881, Sec. 225).

JOHN F. DILLON,
DAVID D. DUNCAN,
For Plaintiff in Error.

SUPREME COURT U.S.
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1595.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

JOHN FITZGERALD,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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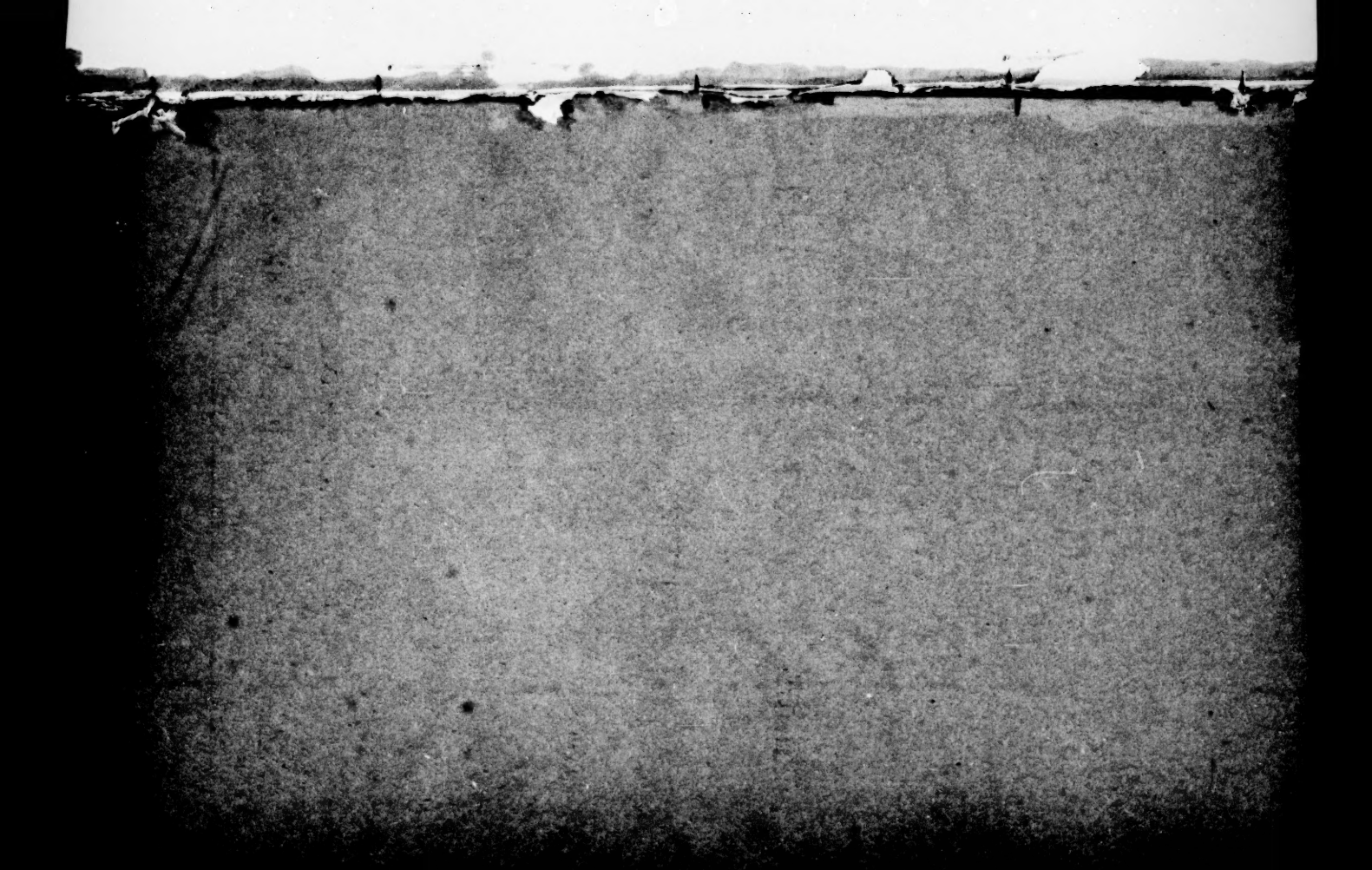
JOURNAL CO., Blank Book Makers, Stationers and Printers, Lincoln, Neb.



Supreme Court of the United States.

OCTOBER TERM, 1890.

THE FITZGERALD & MALLORY CONSTRUCTION COMPANY, Plaintiff in Error, AGAINST JOHN FITZGERALD, Defendant in Error.	No. 1595.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error correctly states that this is a case originally brought by John Fitzgerald, a citizen of Nebraska, in the district court of Lancaster county in and for said state, whence it was removed into the circuit court of the United States for the district of Nebraska upon the petition of the plaintiff in error, a corporation created under the laws of Iowa. It is correctly stated likewise that a claim was alleged for some $51,000 and interest. The action was instituted under sec. 59 of the Compiled Statutes of Nebraska, page 864, which is as follows:

"An action, other than one of those mentioned in the first three sections of this title, against a non-resident of this state, or a foreign corporation, may be brought in any county in which there may be property of or debts owing to said defendant, or where said defendant may be found."

In this case the necessary affidavit for attachment and the necessary affidavit showing that there were debts owing to the said plaintiff in error from the Missouri Pacific Railway Company, with the necessary writ of attachment and the necessary notice to the garnishee, were regularly made, and the suit is one properly *in rem* to appropriate the debts thus due.

Under the Nebraska code, the plaintiff in error being a foreign corporation in this suit, and, as is stated in plaintiff's brief on page 5, neither did it at any time have a managing agent here nor do any business in Nebraska, this being the state of facts, the only provision for getting service on a foreign corporation is in sec. 75 of the code, where the defendant is a foreign corporation having a managing agent in the state, the service may be made upon such agent; but having no managing agent in the state, no service could be made upon it. The only way the case could be changed from one *in rem*, to appropriate the debts, to a case *in personam*, was by the voluntary appearance of the defendant below, which as we think was duly made.

First—There is no question but what the court had jurisdiction of the subject-matter, and that until an appearance was made by the plaintiff in error that it was a case *in rem* to appropriate the debts due to the plaintiff in error.

The nature of the action, as will more fully appear hereafter, was this: John Fitzgerald, who is probably the most successful railroad builder in the west, in partnership with S. H. Mallory had contracts for building some 600 miles of railroad in Kansas and Colorado, and that they formed a corporation, of which, after it was formed, Jay Gould, Sidney Dillon, and Russell Sage, as it appears in the evi-

dence, obtained a majority of the stock. The railroad was built for the Denver, Memphis & Atlantic Railroad, but the Missouri Pacific obtained control of it about the time it was finished. Of the directors of the Fitzgerald & Mallory Construction Company, three of them lived in New York, and two of them, S. H. Mallory and the defendant in error, in the west. This whole matter of building, as it appears by the evidence, was put under the control of S. H. Mallory, who was president of the Construction Company, and he availed himself of the valuable services of Mr. Fitzgerald and made him manager of the work. Mr. Fitzgerald went on, let the contracts and managed the building of the road. It was a job which involved the expenditure of some seven millions of money. Mr. Mallory drew his drafts, as usual, for some $40,000, which the New York directors refused to pay. This amount was due to laborers and contractors. While they refused to honor the drafts, the Construction Company had some $175,000 worth of rolling stock, which the Missouri Pacific were to buy, and the New York directors said in a short time we will pay this amount. In the meanwhile the laborers and contractors were clamoring for their pay, and as Fitzgerald had made the contracts and had employed them to do the work, and as the Construction Company by the refusal of the New York directors to pay anything had lost all its credit, the only way to pay off the debts of the Construction Company was by Fitzgerald & Mallory endorsing the notes as accommodation endorsers. In other words, the banks were not willing to furnish money anyway to the Construction Company, but would furnish it upon the endorsement of Mr. Fitzgerald and Mr. Mallory, and the notes were endorsed by them. This put a heavy responsibility

upon them. This was in the early part of 1888, and Mr. Fitzgerald and Mr. Mallory went on immediately, I think as early as April or May, and saw the New York directors, but they would do nothing. (See evidence on pages ———.) The matter ran along, Mallory and Fitzgerald repeatedly going to New York and asking the directors there, who were millionaires, to lift this load off their shoulders. They would make some propositions to buy Messrs. Mallory & Fitzgerald out, but would refuse to relieve them. In one meeting Mr. Mallory offered a resolution to borrow the money. This the New York directors, Sidney Dillon and Russell Sage, voted down at once. Mr. Fitzgerald got tired and, as the evidence shows, told them that he would sue them, then and there bringing suit. Mr. Mallory was averse to bringing suit. The evidence of Fitzgerald, on page 37, is as follows:

"I told Mr. Mallory, he opposed the suit from the first to last, and when I was in New York I told the directors that I was going to bring suit unless they settled the matter."

And on page 38 he says:

"I had some other business of course with Mr. Mallory, but I had been trying to get a settlement out of these people for two years, and couldn't get a settlement out of them. I had some other business with Mr. Mallory besides, and I telegraphed him to come over. Mr. Mallory opposed the suit from first to last, because they were promising from day to day that they would make settlement, and we went to New York several times for that purpose."

In a long practice I never saw such oppression practiced by a portion of the stockholders of a corporation upon the others. Here are Gould, Dillon, and Sage, and George Gould, owning almost the entire stock of this cor-

poration, while Mr. Fitzgerald, of the million and a half of stock, owned one-tenth, and they deliberately saddle a debt upon his shoulders of over $50,000 and propose to freeze him out, crush him out. He and Mr. Mallory, on a good deal of the obligation sued upon, were forced to endorse for the company, but Mr. Mallory refused to do anything; hence Mr. Fitzgerald, as endorser, pays off the indebtedness, and brings this suit against the company. He has business with Mr. Mallory, who is running a business in Omaha, Nebraska, and who has been a director with Mr. Fitzgerald. Mr. Fitzgerald sends a telegram that he wants to see him on business, and it is other business that he has with him; he commences this suit, and has a summons served upon him as president. The service was as follows:

"I hereby certify that on the 24th of December, 1888, I served the within writ of summons on the within named, the Fitzgerald & Mallory Construction Company, by delivering to Smith H. Mallory, the president and managing agent of said Fitzgerald & Mallory Construction Company, a true and certified copy of this summons."

Nature of Action.

In the case of Cooper v. Reynolds, 10 Wallace, 317, this court, through Justice MILLER, says in a case similar to this:

"So the writ of garnishment, or attachment, or other form of service on a party holding a fund which becomes the subject of litigation, brings that under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court. The essential purpose and nature is to establish, by judgment of the court, a demand or claim against the defendant, and to subject his property lying within the territorial jurisdiction of the court to the payment of the demand. If the defendant appears, the case becomes nominally a suit *in per-*

sonam, with the added incident that the property attached remains liable and under the control of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand."

The court further say, on page 319:

"Now in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect — the levy of the writ of attachment on it — is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*."

Now in their plea to the jurisdiction (see record, page 40) they pray:

"Wherefore defendant prays that all further proceedings herein shall be stayed, and this action be dismissed for want of jurisdiction."

Nowhere has it been asked that the service be set aside.

ARGUMENT.

I.

The first point in the argument of plaintiff in error is that "the court below should have refused to proceed with the action when it was shown that the *jurisdiction* over defendant was obtained by means of a fraudulent device and trick."

First — The court will take note that the defendant never made any motion whatever to set aside the service. *Their motions* were for a nonsuit, and to dismiss the action because the district court of Lancaster county never had any *jurisdiction*. The *cases cited* by the plaintiff in error are the cases where a motion was made to set aside the ser-

vice of the summons, and the order of the court in each case went no further than to set aside the *service.*

We have in this case a plea to the jurisdiction and a motion for a nonsuit; we have likewise a motion to dismiss. (Record, pages 33 to 42.) We understand that there are two grounds:

First—That the service of the summons on the president of the company was obtained by fraud.

Second—The second cause in defendant's motion for a nonsuit reads as follows: "Because it appears from the petition that the defendant is a foreign corporation and was improperly sued in Lancaster county, Nebraska." The fourth cause, on page 42 of dismissal, is "that at the time said summons was served the said S. H. Mallory, president, was not in the state of Nebraska on any business for the defendant company." The fifth cause is "because the defendant is a foreign corporation and has not transacted any *business* in the *state* and at the time said suit was brought and summons served on Mallory, defendant had no general managing agent and no managing agent in the state, and had no office or place of business in the state."

If I gather the full import of these two objections, the first is, that the court got jurisdiction over the person of the corporation by fraud. The *second* is, *that it got no jurisdiction at all*, for the reason the defendant being a corporation, and the president not being in Nebraska on business for the defendant company at the time he was served, and they having no general office or place of business, and were doing no business in the state, that therefore the sum-

mons served upon them was void, the same as if it had not been served; that is, it was an unlawful service on the company. The last position is probably good. St. Clair v. Cox we think holds that where a corporation is not doing business in the state, and the president or any officer is there not transacting business for the corporation, that it cannot be said that the corporation was even within the state so that service could be made upon it.

St. Clair v. Cox, 106 U. S., 350.
Foster's Federal Practice, 154, and cases there cited.
Carpenter v. Westinghouse Air Brake Co., 32 Fed. Rep., 434.

Then the only real effect the service of summons would have would be to give the defendant actual notice of the pendency of the suit, so, after a notice upon them, they could not come in at any time within *five years* and open up the judgment. For in thirty years' practice, and having many cases of this nature, I never knew one of any magnitude where the defendant did not appear and contest the right of the plaintiff to the amount claimed. It was the sensible thing to do which they did.

We think the corporation was bound to know whether it had ever done any business in Nebraska. If not, the president could not have been here on business for it. They are bound to know that there was no place of business in Nebraska, and had no officers in Nebraska, and there is no pretense but what they did know of these facts, and knowing these facts they made a voluntary appearance. They must have known before they appeared what the law was on this subject. *Jurisdiction of person* was obtained

over the *defendant* by a *voluntary appearance*, and if they have been injured by it, the *defendant alone is to blame.*

I am aware that in the argument of the case here they appeared to have abandoned the last position. Doubtless the able counsel employed in this court saw at once that the last objection nullified the first, hence he makes his argument entirely upon the first cause: that the case ought to be dismissed because the service on the president of the company was obtained by fraud. For the sake of argument we will examine the *first* objection.

II.

Was it a Fraud?

We will examine the cases where the court has jurisdiction over the subject-matter by attachment, and the only question which arises is as to the deceit practiced to get *jurisdiction* of the *person.*

The very statement of the case shows that the Minnesota case, the only attachment case cited by the plaintiff in error, is in no way analogous to the case at bar.

In that case they attack the *jurisdiction* over the *subject-matter*; they attacked the service of the writ of attachment; they attacked the right of the plaintiff to try the case *at all* in Minnesota. The fraud consisted, not so much in inveigling the defendant there, as inveigling the property there where they could get jurisdiction over the property and try the case in Minnesota, when it ought to have been tried in Wisconsin.

So there is very little resemblance, and there is a distinction made in all the authorities, between the jurisdiction of the case and merely the jurisdiction over the person.

In Briggs et al. v. Humphrey, trustee, 1st Allen Rep. (Mass.), 372, the court say:

"The action was not local, and the objection was not therefore, strictly speaking, to the jurisdiction, but to the sufficiency of the *service* of the writ."

The court further say:

"Now it is well settled that a mere defect of service may be waived by a defendant, and is held to be waived if he enters a general *appearance*."

Now Kansas has the same law as ours, and in a similar case, Karney v. Taylor, 4 Kansas, 182, the court say:

"It is charged by counsel for defendant in error that the procuring of Meyer to come to Douglas county for the purpose of being served with process was an act of fraud on the part of plaintiff in error. We do not think so; on the contrary it was a legitimate act of diligence which might have resulted in securing their claim had not the rights of other parties intervened."

The cases cited by the other side are all cases where the jurisdiction of the subject-matter depended upon service upon the defendant, but where the court has jurisdiction of the subject-matter and has tied up the property of a person or a corporation, the sooner that person or corporation can come to look to the interests of the property the better.

2. As we understand, there can be no legal fraud unless the party has been damaged or prejudiced by it. Courts do not sit to try imaginary wrongs, but real ones. There is no evidence going to show that the defendant has been damaged or prejudiced in the least by the service on its president. We have already shown that the counsel must have believed even at the time of trial that no lawful service could be made upon their president by his sim-

ply being in Nebraska, not on any business for the company, and the company doing no business in Nebraska. If they believed that and then voluntarily *appeared*, I think it ends the question of *fraud*.

But on the square question of fraud, we say that if there were any deception it did not in the least prejudice the defendant; for the record shows (see page —) that before it was time to answer the summons the three directors who lived in New York had appointed an attorney at Atchison, and really all that was done was to get the attorneys of the Missouri Pacific to look to this case; as the Missouri Pacific was garnished, that company also was a party to the case, and would have to look to it, and it was the attorneys of that road that tried the case below and are now trying it in this court. These attorneys had business in Nebraska, both at Lincoln and Omaha; they could reach it in a few hours, and it was an accommodation to them to try this case in Nebraska instead of in Iowa.

The order appointing the attorneys is as follows (page 144 of record):

"*Resolved*, That M. T. Frame, Esq., of Atchison, Kansas, is hereby authorized to *appear* and represent this company as its sole attorney in all suits and proceedings at law and in equity now pending, or which may hereafter be brought."

This was on the 11th of January. The intention was for him to appear in the case and to *contest it*. If he did appear to set the summons aside, it would not have dismissed the case for want of jurisdiction. He did the only sensible thing that could be done; he appeared; that gave him the right to contest the claims of the plaintiff, and he claims to have beaten $10,000 of them.

He appeared generally in the case by filing a general demurrer before the time he was required to appear by the summons, at the same time filing a petition to remove the case from the district court of Lancaster county, Nebraska, to the circuit court of the United States, which was done; the trial was had in Omaha, away from the home of the plaintiff, making heavy and additional costs to plaintiff, and it was had on the chosen forum of the defendant. The trial was mainly conducted by the Missouri Pacific attorney; the headquarters of the Construction Company was in Chariton, Iowa, away off the line of the Missouri Pacific, and in an out-of-the-way town, hard to get at; whilst the trial of this cause was on the line of the Missouri Pacific, enabling the Missouri Pacific attorneys, without any difficulty, to attend both the attachment proceedings and merits of the case. There is nothing to show that the Construction Company was in the least prejudiced by the deception, if there was any deception.

The nature of the claims which defendant alleges that he has defeated by appearing in this suit was as follows: Before the Construction Company, defendant, was formed as a corporation, Fitzgerald and Mallory, as partners, had got the contract for building the road about which this controversy arose. They had graded sixty miles, and the evidence shows that they had obtained almost a million of dollars' worth of aid. Mr. Fitzgerald, as manager in the matter, had put in one year's work, for which he charged $5,000. Further than that, there came a question about the validity of the aid voted it, and at great expense Mr. Fitzgerald had the matter set at rest by a special act of the legislature, and in and about having this corrected he spent large sums of money paying attorneys. He paid myself

$400, although in my evidence I said $300. After the corporation was formed, all of this work, grading and municipal aid, was turned over to the corporation; they got the benefit of it, with the understanding that they were to pay all outstanding debts and liabilities. The court ruled that his payment of fees to me, and his labor for the year having been done before the corporation was organized, the corporation was not liable for it, although they got the benefit of all this vast labor and vast sums. We think the court clearly erred and that the law in a case of this kind is clearly laid down in Morawetz on Private Corporations, 550, where it says:

"After a corporation has knowingly received the benefit of an engagement entered into by its promoters, it will usually not be permitted to deny that it agreed to assume the corresponding burdens."

Bell Gap R. R. Co. v. Custer, 79 Pa. St., 54.

The defendant was hardly prejudiced by the trial in the United States court. The prejudice was the other way. I refer to this to show that on the whole if there was deception in getting a personal summons upon the corporation, that that deception worked no prejudice to defendant.

We think the case of the Commercial National Bank v. Davidson, as reported in 22 Pac. Reporter, on page 520, throws some light on the question:

"The claim by appellant's counsel, that there was an abuse of process in the commencement of the suit, arises out of the fact that the respondent's counsel represented to the appellant and his counsel that they were coming to Portland to bring a suit in the United States court to adjudicate the question of the lien, and that appellant and his counsel were thereby, in order to save time and unnecessary expense, induced to come to Portland also, to contest an application for a receiver, or give bond if a receiver should

be ordered; that a stipulation was signed, entitled in that court, waiving demand for possession; that when appellant arrived in Portland, he was almost immediately served with process from the state court. The appellant resided in Malheur county, Oregon, and claims that he should have been sued in the circuit court for that county, if sued in the state court, and that it was a deceit in respondent's counsel in so inducing him to come to Portland. I do not think the facts referred to constitute such deceit as required the circuit court to set aside the service of the summons upon the appellant. It appeared that the respondent's counsel did intend to bring the suit in the United States court, but when he got to Portland he found that that court had no jurisdiction in such a case, and he therefore brought suit in the state court for Multnomah county. If the statement of the respondent's counsel was made as claimed by the appellant's counsel, it constituted no ground of deceit. As the appellant was bound to know whether the suit could be brought in the United States court or not, he should not have allowed himself to have been deceived by a statement which his counsel would have informed him was untrue. *But the deception, if there were any,* did not prejudice the appellant. He could not possibly have been injured by being sued in Multnomah county instead of Malheur county. In any equity case, where the testimony is taken by deposition, it can make but very little difference where the suit is brought. In this case, all the counsel on both sides, who had the management of the suit, after it was begun resided in Portland, and it is very evident that its commencement there was a convenience to all parties."

3. The plaintiffs say no general appearance resulting from the filing of an answer which specially pleaded the want of jurisdiction can be construed as a condonation of the fraud of which the defendant was then ignorant, or as a waiver of the right of dismissal of the suit upon the disclosure.

The first case cited is the case of Blair v. Turtle, 5 Fed. Rep., 391, decided by Judge DUNDY. The court will take notice that this was the judge that overruled the plea of

jurisdiction in this *case*, so that Judge DUNDY must have thought this *case they cite* as very different from the one at bar, and by an examination you will see these differences.

The first one was a mere personal action, and he mentions that as a reason, for he says "in mere personal actions like this one courts claim no jurisdiction over the *wrong-doers* or the subject-matter of the controversy until *personal service of process* can be made on one or more of the defendants, or till the defendants make a voluntary appearance in the case, either in person or by attorney."

Second—The first thing the parties did was to object to the jurisdiction of the person and by special plea, and he says: "This special plea may be treated as a motion to quash the service of process and the return to the writ. It is true the only appearance there was this." The court further say, on page 398, 5 Fed. Rep.: "It was claimed, however, that as the defendant did appear in the state court and did file a petition for the removal of the case to this court, it actually had the case docketed here, and here, on the plea the defendant was estopped," they say then: "but when the application for removal was made, the case stood for hearing on the plea, it stood for hearing on the plea when it was first docketed in this court; hearing was had thereon and at the first possible opportunity afforded the defendants." That was the first thing they did. It is held by a great many authorities that merely filing a petition for removal, where you file with it a special appearance, that the case will stand on the special appearance when it reaches the circuit court. The difference in the two cases accounts for the different opinion of the same judge.

The next case is the 47th Wis. That was another case

such as DUNDY enumerates, where both the jurisdiction over the subject-matter and the person was obtained by the *process*. But there is where again there was a special appearance for the purpose of a motion in order to show cause why the summons should not be set aside. It is true, in a case of that kind, the setting aside of the summons is equivalent to dismissing the case, but the court did not dismiss the case there; they only set aside the service; and in the case of Blair v. Turtle the court say: "The plaintiff can, if he sees proper, have the case continued and an alias summons issued." They did not dismiss the case in either instance. But then that extreme case, he says, would be if the defendant has been guilty of any *laches*. He says a general appearance to the action ought not to bar the court from vindicating the integrity of its own process; but that refers to a general appearance after a *special* appearance.

The third case we have also referred to. Now they claim the filing of a petition for the removal of a case not to be such an appearance as will prevent the defendant. We do not claim that it is, but the filing of a general demurrer at the same time the petition was filed was such an appearance.

The case of Monahan v. Wilson, 2 Flippin, referred to, was a case where the defendant was induced to send a valuable race horse and then come himself from Indiana into Michigan, and after the horse had been fraudulently got into Michigan he was replevied, and a motion was made to dismiss the writ or to set aside service upon the ground that the property replevied was decoyed within the jurisdiction of the state by a fraudulent device of the plaintiff. This motion was made by a special appearance, and at the

same time defendant filed a motion to remove it to the United States court. The court say in reference to this:

"While I have little doubt that filing this petition is a sufficient appearance to answer the requirements of the judicial act, my impression is, it cannot be considered as a general appearance in the case. An appearance has been defined to be a submission to the authority of the court in the case, whether coerced or voluntary, or an act importing that the defendant submits the determination of the material questions to the judgment of the court."

The court holds that it is not a general appearance; that he did not appear. That was all that was necessary to decide in that case. Whatever else is found is evidently a dictum. In that case they refer to the case of Bushnel v. Kennedy, 9 Wallace, 394, where the court say:

"The first act of the defendant no doubt to the twelfth section is something more than consent, something more than a waiver of objection to jurisdiction; it is a prayer for the privilege of resorting to federal jurisdiction, and he cannot be permitted afterward to question it."

That authority refers to Sales v. Northwestern Ins. Co., 2 Curtis, 212. All these authorities are in our favor, because the reasoning shows that when a general appearance is made it waives any defect in service of process.

Laches.

4. But the case of 49 Wis., while it goes to the extreme, holds that the defendant must not be guilty of laches, and that is just what the defendant in this case is guilty of.

II.

It is claimed that they had a right to raise this question in their answer, but the answer, as will be seen, had two

paragraphs numbered 11, and the way that comes about is this: that the one numbered 11 which raises the jurisdictional question was not put there until after the evidence was all in, and under this authority, page 114 of record, "before adjourning both parties were given leave to amend their pleadings to conform to the facts." This you will notice is after all the evidence is in. The record evidence appears after this, but it was put in before, as will appear. In support of this, on page 42 of record, Mr. Frame in his affidavit says "that such trick and fraud was not discovered by defendant until disclosed by plaintiff in his cross-examination on the trial of this case, and immediately thereafter defendant filed his plea." The plaintiff was the last witness on the stand except his attorney, whose evidence was ruled out. So that the motion to the jurisdiction was not made until after the *evidence was all in.*

Again, on page 32, in the plea to the jurisdiction the plaintiff in error says that when said defendant filed demurrer to plaintiff's petition in the district court of Lancaster county and his petition for removal to this court, and when it filed its answer and amended answer herein, it did not know and had no means of knowing the fraud. This objection appears in the amended answer, and they say that when they first filed that amended answer they did not know of the fraud. What I desire to show is that this amendment was made by simply adding to this amended answer, and the date of filing the amended answer does not show when it was filed, but that after the evidence is all in this motion to *dismiss for want of jurisdiction is made.*

Here is a summons served on the president of defendant and served in a state in which the corporation never did

any business, and the attorney for defendant never makes any inquiry of this president of how this came about that he was served there, never tried to find out anything until Mr. Mallory is put upon the stand; they then tried to show that Mr. Mallory advised the commencement of the suit. (Record, page 26.) He denies this but conceals nothing. He says he consulted with Mr. Fitzgerald and his attorney about this suit, but it appears (see record, 38) that he opposed the suit from first to last, because in New York they were promising to pay it up every day. Their evidence shows that Mr. Mallory was opposed to bringing this suit, and it fails to show that he anywhere concealed any fact from the attorneys. There is the simple insinuation in the motion itself that he did; but on the contrary if he was opposed to bringing the suit he certainly would not have concealed it. The truth is, and the record bears that out, that they never said anything to anybody, made no inquiry as to how this service was made, but appeared generally at once to the suit for the purpose of taking it away from the court which they said had no jurisdiction to the United States court. Now if the plea that they did not know anything about this fraud, if it was a fraud, until the cross-examination of Mr. Fitzgerald, who was the last witness examined in the case, be true, it was their own fault if they made no inquiry. We think it would have made no difference in this case, because they had just as good a right to make a general appearance in the case where they had been served illegally as where it is a matter of irregularity, and having appeared first they cannot afterward object simply to the service of a summons, which in nowise affects the jurisdiction of the court over the subject-matter.

A Waiver.

5. It is a general principle of law, with probably no exception, that *where a party* voluntarily appears to the merits of a controversy, he thereby waives all right to object to the process by which he was brought into court, no matter what may be the defects of the same. This is especially so if the court had jurisdiction over the subject-matter and in possession of the *res*, and the process was only to obtain jurisdiction over the person.

But admitting that error lies on a motion to set aside a service of process, the defendant, by appearing in the case on the 19th of January, 1889, and by filing a general demurrer at that time, and also a petition of removal, and having the case removed to the United States circuit court, and then appearing and having the case continued, and then further appearing and answering to it, and then afterward filing an amended answer, and then appearing at the trial and making no motion or no objection until after the last witness is examined, and then making a motion to dismiss for want of jurisdiction, are all acts each one of which would have waived the right to make a motion to quash the service. This court, as I have shown, have held, even in cases where the jurisdiction of the subject-matter, as well as the person, depended on the service of the process, that if they first appeared, that *waived* it.

In 17 Wallace, the case of Eldred v. Bank, 551, the court, through Justice MILLER, say:

"It is argued by the counsel of the defendant in error that the withdrawal of the plea of Anso Eldred left the case as to him as though he had never filed the plea. The filing of the plea was both an appearance and a defense.

The case stood for a time between one term and another with an appearance and a plea." [So this case did.] "He was not, by withdrawal of the plea, out of court. Such doctrine would be very mischievous in cases where it is very often the first and only evidence of the appearance of a party to a filing of his plea, answer, or demurrer. The case might rest on this for a long period before it was ready for trial, but if the party could obtain leave to withdraw his plea he could thereby withdraw his appearance; the plaintiff is left to begin *de novo*. But if a man should come in and try the case and then make his motion to quash, the mischief would be much greater."

Again, in the case of Creighton v. Kerr, 20 Wallace, 12, where the court say, "A general appearance waives *all question* of *the service of process;* it is equivalent to *personal service*," a question of jurisdiction only is saved.

U. S. v. Yates, 6 Howard, 605.

Plaintiff in error claims that the case of Van Horn Bros. v. Great Western Mfg. Co., 37 Kansas, is in point. The decision was delivered by VALENTINE, J., and there is where there was no question that by fraud and deceit the defendant was inveigled into a county other than where he resided, for the purpose of getting jurisdiction over him, thus getting jurisdiction over both the subject-matter as well as the person. It was to require him to try his case where it could not be tried *except* for the *fraud*, but in that case the court say: "The appearance of the defendant was only special, and for the motion only." I have looked through the Kansas decisions to see if I could not find one in point where fraud had been perpetrated in serving the summons, and then the parties had made a general appearance instead of a special one in the first instance, and I find a case in point in 23 Kansas.

The case of Berry v. Coffman, 23 Kansas, 460, is probably nearer like the case at bar than any I have been able to find, and the authority is only better because the Kansas code is about the same as the Nebraska code. This was an action on a certain promissory note, the defendant residing in Crawford county, but being temporarily present in Bourbon county he was sued in the latter county; a summons and an order of arrest were duly issued and served upon him while he was temporarily present in Bourbon county. This was done in June, 1878. On June 7, 1878, he filed a motion to the merits and asked to be discharged from arrest. On July 1, 1878, the defendant appeared specially by his attorneys and filed motion to set aside the service of the summons issued in this case. On September 2d he again appeared by his attorneys and filed a motion to vacate the order of arrest issued and served in this case. These motions raised the same question, to-wit, that the defendant had been sued in the wrong county and therefore that the court could not take jurisdiction of the case. The ground for each of such motions was substantially as follows: the plaintiff combined and confederated with one W. P. D. for the purpose and with the intention by fraud and trick to induce the defendant to come out of Crawford county aforesaid into this, Bourbon county, so that service of summons could be made on him in this county, and so that he might be arrested on an order of arrest in this action in this county, instead of Crawford county, and for no other purpose or reason whatsoever, and that the defendant, because of these inducements and for no other reason, went into Bourbon county where such service and arrest was made. The defense to this plea to jurisdiction was:

First—That the defendant made a general and voluntary appearance.

Second—Denying all fraud. Upon evidence introduced the court sustained both of said motions, setting aside the service of summons and vacating the order of arrest.

The supreme court say:

"He first chose to take his chances upon the merits of the order of arrest before moving to vacate it upon any technicality, and by doing this he admitted the jurisdiction of the court to hear and determine the matter upon its merits, and now after obtaining the decision of the court upon the merits of the question, and after causing costs to be made in the case, he cannot repudiate his submission to the jurisdiction of the court. *Courts cannot be trifled with in this manner.*"

We think it is a general principle of law, with probably no exception, that where a party voluntarily appears to the merits of any controversy he thereby waives all irregularities which may have intervened in getting him into court.

In a later case in the 29 Kansas, Metzel v. Kirkpatrick, a decision delivered by Justice BREWER when on the supreme bench, fully sustains the decision in the 23d, and seems to me lays down the true rule in a case of this kind. Page 682, the court say:

"But it is also true that the district court of Wilson county had ample jurisdiction over the *subject-matter*, and when Metzel appeared in that court and by his pleadings raised questions other than jurisdictional, he thereby submitted himself and his rights to the jurisdiction of the court. A party who denies the jurisdiction of the court over *his person* must first present *this single question;* he may not mingle with this plea to the jurisdiction other pleas which concede jurisdiction, and thereafter insist that there was error in overruling his plea to the jurisdiction. By such other pleas he submitted himself and his rights to the jurisdiction of the court."

Taking all three of these decisions of Kansas together, two of them were made by VALENTINE and one by Justice BREWER, and we think the law plainly laid down that no matter what the irregularity of the summons is, or whether the service was obtained by fraud or deceit or not, that a voluntary appearance to the merits of the case cures any objection that may arise to the service of a summons, and the case in 23 Kansas, where the party goes to trial on the merits before raising the objection, they hold that it is *trifling with justice to raise it afterward.*

The rule is the same in Ohio, and both Kansas and Nebraska have, in the main, adopted the Ohio code.

They do not ask at this time that the service be set aside, but that the case itself be *dismissed.* The jurisdiction, recollect, does not depend upon service upon the company. This has been held under Nebraska laws and under the Ohio code in itself to be a general appearance.

Elliott v. Lowhead, 43 Ohio State, 176.

The court say:

"The overruling of the motion to dismiss is assigned as error. This motion assigns two reasons why it should be granted: 1st, want of legal and proper service, and 2d, because the court had no jurisdiction of the subject-matter. This last ground was in the nature of a demurrer to the jurisdiction of the court, and was in itself an appearance in the case; it amounted to the waiver of service and gave the court jurisdiction over the *person* of the defendant. It is true the defendant comes for the purpose of filing this motion, and for no other purpose, and had the motion been confined to the want of proper *service* it would not have operated as an appearance. It was not so limited, but embraced an additional reason, to-wit, the right of the court to hear and determine the subject-matter. The rule is that where the defendant appears solely for the purpose of objecting to the jurisdiction of the court over the person, such

motion is not a voluntary appearance of defendant which is equivalent to service; where however the motion involves the merits of the case made in the petition the rule is otherwise."

Handy v. Ins. Co., 37 Ohio State, 366.
Mallon v. Marshal, 29 Ohio State, 666.

They further say:

"Here one of the grounds of the rejection, as raised first by the motion, afterward by the demurrer, was that the defendant was not liable in that court; in other words, the court had no *jurisdiction* over her as a married woman to grant relief as prayed for. This was a waiver of *service*, a voluntary appearance of defendant equivalent to a service."

It is held under this code (Ohio) that the first thing you must do in apperance is to object to jurisdiction. They say in Mason v. Alexander, 44 Ohio State, 329:

"The present case is one where the defendants did not make objection to the jurisdiction at the first opportunity; but they appeared first and objected afterward, and we do not perceive that Aitken v. Miller is authority against the position we seek to maintain. It will be borne in mind that *we are not dealing with a case where the lower court had not jurisdiction of the subject-matter* of the action, though even in such a case, if it was one where the appellate court would have original jurisdiction, and the party defeated below appeals to it and there appears without objection, pleads to the merits, and enters upon a trial, he cannot afterward be heard to question the court's jurisdiction."

In this case there is no question but what the court had jurisdiction over the subject matter.

If all that is claimed were true and the jurisdiction of the person was obtained by service of the summons, the only thing would be to set aside the service; but whatever may be the laws of Wisconsin or other states, under the

law in Nebraska where a general appearance is the same as though a summons *was fairly* served on the defendant, an appearance not only *waives* defects, but waives the necessity of any summons at all being served upon the defendant, and under our code, which was taken from the Ohio code, the decisions both in the supreme court of Ohio and in Nebraska are uniform on this proposition "that defendant may appear specially to object to jurisdiction, but if he seek to call into action any other power of the court, his appearance is general."

Porter v. C. N. W. R. Co., 1 Neb., 15.
Altman v. Steenman, 8 Neb., 112.
Hilton v. Backman, 24 Neb., 505.

They have further held that an action against a public officer cannot be brought against him in a county other than where he holds his office; yet if he pleads to the merits he waives that right.

Keene v. U. P. R. R. Co., 5 Neb., 107.

II.

The second point that the plaintiff in error makes is that the court erred in directing the jury to find for the plaintiff in the full sum of the notes with interest, notwithstanding the fact that as to the notes declared on in the first and second causes of action it clearly appeared that plaintiff was under no obligation whatever to pay them, and was a mere volunteer. Under that head plaintiff in error's argument is twofold:

First — That all the notes and drafts described in the petition included in the several causes of action were made

by the president of the defendant company and by its auditor without the knowledge or consent of the board of directors; and

Second — That the notes in the two first causes of action were paid by the plaintiff, and he was under no obligations to pay them. *He was a mere volunteer.*

I.

1. On the first proposition.

The claim that all the notes and drafts described in the petition, and included in the several causes of action numbered 1 to 10, 11, 12, and 13 were made by the president of the defendant company or by the auditor without the knowledge or consent of the board of directors, and that the secretary of the company did not join in their execution; the claim is that they were not executed in conformity with the articles of association or with the by-laws of the corporation. The by-laws enumerate the powers and duties of the president to be:

"Sec. 3. The president shall perform the duties that usually pertain to the duties of his office, and be the chief executive officer of the company, and in the absence of contrary instructions by the board of directors, shall be charged with the general management of the business of the company."

The evidence shows that there were not only no contrary instructions given, but that the president was authorized to build the 600 miles of railroad, and to do everything by way of contracting for the same; that he made all the contracts; that is, through him, or through his manager, and did all the work; that he was expressly authorized to draw checks and drafts; and others were authorized to

draw checks and drafts and did draw checks and drafts of the company. As early as May, 1888, the directors were notified of the giving of these notes. On page 62 the witness is asked:

"Q. When did you first go to see them (the directors) after the notes were given?

"A. It was in the fore part of May I was in New York.

"Q. Did you refer to them in any of the directors' meetings or in the meeting of the directors, or was anything said about this indebtedness, the bills payable — that these notes were given, and if so, what was it?

"A. We talked in regard to that, and they said these matters should be settled up very shortly.

"Q. Were you ever there afterward, at a directors' meeting, at which this matter was again brought up?

"A. Yes, sir; several times."

On page 106 of record, Mr. Fitzgerald's evidence:

"Q. Was the matter of having given these notes, and you having endorsed them — you and Mr. Mallory — talked over at that time with the directors there?

"A. Yes; that was the chief business to New York. We waited there for a few days to get Sidney Dillon, Russell Sage, and Mr. Cross to consult in the matter, and to make arrangements for the directors there to get money to pay the indebtedness of the Construction Company, this indebtedness that Fitzgerald and Mallory were held responsible for.

"Q. They knew all about the giving of these notes?

"A. They knew that and they knew of more indebtedness."

First — We think the by-laws gave plaintiff, as in a case of this kind when no contrary instructions were given by the directors, the power of the directors in the managing in building this 600 miles, making the contracts and in paying the debts.

Second — The directors, having been informed of this, and it having been talked about how they should pay

them even, it is too late for them to file an answer a year after, through their attorney, to object to the mere form in which the note has been made, when the proof is clear that it was given for money paid, and the proceeds were used by the company.

The case of Rolling Mill v. St. Louis R. R., 120 U. S., is in point on this matter. Speaking of a similar transaction, there the president secured a contract without authority, the court, through Justice MILLER, say:

"In regard to this it appears that the board, when notified of what had been done by their agent, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the resolution."

Now in the case at bar the directors have never disaffirmed the making of these notes, or any action of the president. The only thing looking to that is the filing of an answer by the company more than a year after they had been told by the president all about the *matter*. We do not consider that as an act of disaffirmance; it appears to be entirely the act of the attorney. But if it was, innumerable authorities are cited in the case in 120 U. S. to sustain our view.

There is not an iota of testimony anywhere but what goes to show that the notes were executed to borrow money for the defendant, and that all the proceeds were used for the benefit of the defendant, and that the directors were advised of the transaction individually and at the meeting of the directors both, and we think that the case of Creswell v. Lanahan, 101 U. S., 351, is in point. The court

say in a case where a note was given as these were given, without any special authority from the trustees or directors, "the money was fairly borrowed, the note was given for it, and the fund was honestly applied in payment of pressing liabilities of the company, the trustees individually were advised of the transaction and made no objection. It would be a perversion of the plainest principles of reason and justice to permit the validity of such a security to be effectually denied. It cannot be." The authorities are all one way on this point.

The common sense view of it is that the president having the full management of everything in the building of 600 miles of road, and the disbursement of seven millions of dollars, it would necessarily follow in a work so vast that not only he but other agents that he appointed would necessarily have to make contracts. His power to make notes or to execute them is, as we understand it, the same as any other contract.

1st. Morawetz on Corporations, 351, lays down the rule:

"In the United States a corporation has implied authority to issue negotiable paper for any legitimate purpose, although the issuing of negotiable paper may not be required under ordinary circumstances in carrying on the kind of business in which the company is engaged. There is no difference in this respect between the issuing of negotiable paper and the making of contracts of any other class."

In R. R. Co. v. Howard, 7 Wallace, 412, the court, speaking through Justice CLIFFORD, says:

"The power to make contracts and acquire and transfer property is conferred upon such corporations by the laws of the state to the same extent as that enjoyed by individuals, and the record shows to the entire satisfaction of the court that the instrument of guarantee was executed and

the bonds sold in the market as the means of raising money to construct the railroad and put it in operation."

There is where the railroad company endorsed negotiable instruments and guaranteed their payment. Now in this case the record shows by the by-laws that the president's power is, "in the absence of contrary instructions by the board of directors, shall be charged with the general management of the business of the company." He had a a right to make all of the contracts for the building of this 600 miles of railroad. He did, through himself and agents appointed by him, make all the contracts. In the light of the best authorities it would be strange that he could not, after making a contract with a contractor to lay the track of this railroad, make arrangements to pay him. He could make arrangements to spend the money, but he couldn't make arrangements for its payment. This leads to an absurd conclusion.

2. It is claimed, that although these notes were a binding obligation of the company and having been lifted by Mr. Fitzgerald, and he having them assigned to him, he cannot recover, because he was under no obligations to pay them. He was a mere volunteer.

First—We think the argument is based upon a mistaken idea of the facts in the case. "It is claimed that it was not alleged that the company had received the proceeds or any benefit from these notes." The notes purport to be for value received, and are signed by the Construction Company by its president, who had at the time, as a manager, the full power to manage everything.

It is not necessary to allege, although the proof is ample

on that subject, in declaring on an instrument of this kind that there was no *consideration*. That must be raised affirmatively in the answer.

Second—Again it is claimed "neither of them was payable to plaintiff, nor does it anywhere appear that they were endorsed by him or paid by him at the request of the company or its officers."

On the contrary, the notes in both causes of action are set out, copies given, and the copies show endorsed "John Fitzgerald, Lincoln; S. H. Mallory, Chariton, Iowa." Take the second cause of action: The allegations are that when said note fell due on the 25th of September, 1888, the Fitzgerald & Mallory Construction Company failed to pay the same, and John Fitzgerald, endorser, who endorsed the same without any consideration (passing to him), paid said note, and the same was transferred to him by the cashier, as follows: "Without recourse. W. T. Oakley, Cashier."

The answer does not deny that Fitzgerald endorsed the notes, but denies that he endorsed them at the instance and request of the *defendant*. In other words, the answer is that the president had no authority to ask Mr. Fitzgerald to endorse them and that Fitzgerald was therefore a volunteer; but the facts as to these matters were fairly submitted to the jury and they found in favor of the plaintiff upon them.

Evidence.

The evidence shows that the usual mode of paying for work done by the Construction Company was by drafts drawn on the treasurer by S. H. Mallory, president (see page 56).

Page 57 shows that Mallory drew drafts for this money (which was afterward borrowed from the banks) on the treasurer in New York, and he returned them "Unpaid; no funds." The evidence further shows that the plaintiff here, Fitzgerald, in the first instance before any money was provided for, himself borrowed the money and furnished it for the company; when it was found out that there was no money in the treasury to pay the contractors and men that did work for the company, the president saw that they would have to do as they did in the commencement of the work, borrow the money, and he asked Mr. Fitzgerald to endorse. See the following evidence:

"As to the claim in the second cause of action for $15,290.24, there was given to Bracey Brothers in final settlement of the account of their contract for laying track, three drafts, two for $5,000 each and another for $5,290.24. On page 58, which is Mr. Mallory's evidence, he is asked to state what these were given for; he states that they were given to Bracey Brothers in final settlement of their account for track-laying."

"Q. Did you have any funds to pay them?
"A. We did not, and when they matured we took them up with notes of the Fitzgerald & Mallory Construction Company."

On page 59, he says they accepted these notes in payment of the drafts.

"Q. Did they not refuse to accept them, unless you and Fitzgerald endorsed them?
"A. Yes, certainly, and I notified Mr. Fitzgerald they would not accept them unless we endorsed them.
"Q. On what bank were those notes given?
"A. On the Union National Bank, Chicago."

On page 150 he says when the notes became due there was no money on hand to pay them. Finally they refused to take up the Construction Company's note and a new one was given to take up the first one.

"Q. Has note been paid to First National Bank?
"A. Yes, sir."

See also record, page 60.

What plaintiff in error must mean then when he says that it does not anywhere appear that they were endorsed by him or paid by him at the request of the company or of its officers, or with their knowledge and consent, that it was not paid by the knowledge and consent of the directors in New York. In reply to that we say that the evidence shows that Mr. Fitzgerald as manager employed the hands, made the contracts at the suggestion of the president, to whom was entrusted the entire management of building this road, and it might be said that he made the contracts by hiring without the consent and knowledge of the company or its officers; but the company had said both by its acts and its by-laws that the president should have the full management of this whole matter, and that what he said or did was what the company did, and the power which authorized Mr. Fitzgerald to make other contracts would allow him to make the contract of endorsement on these notes.

The court, in its instruction (see page 173), assumes that this was properly endorsed by the plaintiff, and say:

"As to the promissory notes which were endorsed by the plaintiff, upon which he is held as endorser, if the jury find from the evidence that said notes were executed in good faith by the president of the Construction Company, and the proceeds of the notes and drafts, for which the notes in question were a renewal, were received for the use and benefit of the Construction Company, and you further find that

the plaintiff is now the holder and owner of said notes, you will find for the plaintiff in the full sum of said notes with interest."

The only objection is to this, "you will find for the plaintiff in the full sum of said notes with interest." No objection is made to the other portions of the charge.

The jury must have found that the notes were executed in good faith by the president of the Construction Company, and that the proceeds of the notes and drafts, for which the notes in question were renewals, were received by and used for the benefit of the Construction Company, and they further found that the plaintiff is now the holder and owner of said notes, and holds them as endorser.

It follows from these findings that Fitzgerald holds the notes as an accommodation endorser, and is subrogated to all the rights of the bank.

He is certainly subrogated to the rights of a creditor, and I care not, because under our code pleading it matters not, whether you call this a suit on the note or a suit for money paid at the request and for the benefit of said Construction Company. In either case he would have the right to recover.

In the case of Bush v. Wadsworth, 60 Mich., 266, the court says, in reference to the director that paid debts same as the plaintiff in this case:

"He had the confidence of the Chicago directors, as they admit, and the burden of the whole business was put upon him, and the whole proofs show that he honestly and faithfully endeavored to fulfill the trust. He used his own credit to buoy up the business and was a great loser thereby. He has the right to be compensated for the expenditures made to protect the company as well as himself. It was necessary that he should make the payments upon these mortgages, not only to save the property of the com-

pany, but his own interest as a bondholder and stockholder."

The proof on promissory note in the first cause of action shows the same state of affairs. (See record.) So that both of the notes in these two causes of action were endorsed by the plaintiff Fitzgerald, and one of the notes at least, went to protest, see pages 150, 151, and 152 of record, and that after if was protested for non-payment, as such endorser, Fitzgerald paid off the note and had it assigned to him.

I.

In Tuscaloosa Cotton Seed Oil Company v. Perry, 4 Southern Rep., 635, the court say:

"The note having been made to borrow money for the corporation, which it received, and having retained for its own benefit the fruits of the transaction, the defendant is estopped to deny, as against the holder, the binding character of the obligation, and the authority of the president in the transaction, and equally against the accommodation endorser."

In Borland v. Haven, 37 Fed. Rep., 406, the court say:

"The note was made payable in form to Borland, Hamey & Graves, and endorsed by them and delivered to the Bank of California. The transaction was between the Bank of California and the corporation, and not between the corporation and the nominal payees of the note. The consideration of the note was advanced by the bank to the corporation on the note and endorsement. The transaction is substantially, so far as the corporation and Borland are concerned, the same as if the note had been jointly made to the bank as payee by the corporation and Borland as joint makers, instead of its being made payable in form to Borland and endorsed by him to the bank. The money was not advanced on the note, but on the endorsed note. The note went to protest and Borland afterward paid it."

Bear in mind that the testimony in the case at bar shows that it was on the endorsed note that the money was paid. The bank would not accept the note until it was endorsed by Mr. Mallory and Mr. Fitzgerald. Borland, as endorser, had to pay this note, and the court say:

"I have no doubt that the payment of the several sums of money by plaintiff Borland for the benefit of the Wyoming and Dakota Water Company under the circumstances detailed in the statement of fact constitute debts or liabilities of the corporation. That a stockholder and even a director may, in a proper manner, become a creditor of a corporation is settled."

We cite this authority for two reasons:

First.—To show that although Borland was a director he might endorse the note, and when paid by him collect it of the company.

Second—A point is made that the notes in question in this case were not made payable to Fitzgerald. This authority says that makes no difference, and it is a new doctrine to me if it would.

See Oil Co. v. Marburg, 91 U. S., 580.

The evidence on page 57 shows that the president drew three drafts which were marked, amounting to some forty thousand dollars; these drafts were returned "no funds." The plaintiff in this case and Mallory, who was president, were forced to borrow the money to pay for work done on the railroad, and were forced to endorse the notes.

There is no dispute but what Mr. Fitzgerald paid them and now holds them, and has sued upon them.

In the case of Claflin v. South Carolina R. R. Co., page 248, American and English Railroad Cases, vol. IV, in

which the opinion was delivered by Chief Justice WAITE, holds the doctrine that "Directors acting in good faith for the best interests of the company, are entitled to the same rights as other creditors." This is where the director of a company paid off the liabilities and held coupons. They held the coupons or notes and sued upon them and the court says, on page 248:

> "So far as appears they were in no condition to be personally benefited by what was done; and in all the mass of testimony not a word is to be found reflecting on their integrity in the matter. There is nothing whatever in the case to show that the transaction was anything else than a laudable effort on the part of the directors to tide the company over what was supposed to be but a temporary embarrassment, brought about by an unexpected falling off of business, with the hope that, upon a revival of business, a disastrous failure might be avoided."

It is plainly shown by the evidence that Fitzgerald simply paid off the debts at the request of the president of the company, who had the business in hand.

But if we should admit for the sake of argument that Fitzgerald was a volunteer endorser on these notes, the evidence shows that he was the manager of the work in which this indebtedness arose; that he employed the men and, through the president, made the contracts for them, and that he is a stockholder in the company. If, under these circumstances, after having employed a contractor, and that contractor had done work under his management, he, at first with the president, as the evidence shows, borrowed money of the bank to pay off these contractors, and upon the company refusing to pay the money so borrowed by him and the president, he paid it and had the note assigned to him, and he thus became the owner of the note. The question whether he was the owner or holder was

submitted to the jury and they found that he was. As a universal rule of justice he ought to recover.

In the case of Merrick v. Peru Coal Co., 61 Ill., 478, the court say:

"Here is a corporate body, having a legal existence, endowed with ample powers to enter into contracts and agreements, of suing and being sued, which has given notes and drafts to persons in nowise connected with it or its organization, and has given notes and drafts which were undeniably binding on it in law — such instruments as the payees and drawees could, beyond all doubt, have sued upon and recovered after their maturity. So could their assignees. And it may be asked why appellant could not recover, when he, in his own individual right, with his private means, purchased these instruments, so far as we can see, in good faith, or at all events, paid with his individual funds, for the use and benefit of the company. It will not be said that he could not recover because he was a stockholder and officer of the company, as both have the right to deal with the company in the same manner as strangers may, and when they do so each party acquires the same rights and incurs the same liabilities as would strangers.

"It then follows that appellant, notwithstanding he was president of the company (likewise one of its directors) had the right, with his own funds, to purchase these notes and drafts, and when he did so he succeeded to all the rights of the holders. Or he, upon taking up, with his own means, such indebtedness, had the right to maintain an action for money paid, laid out, and expended for the use of appellee."

In the case of David H. Harts and others v. Jefferson Brown and others, in 77 Illinois, page 230, the opinion being delivered by Chief Justice WALKER, the court say:

"We have never known it questioned that a director or stockholder may trade with, borrow from, or loan money to the company of which he is a member, on the same terms and in like manner as other persons. He, then, had power to loan money to the company, and they became liable to pay the same."

Again, on page 234:

"But inasmuch as appellants have paid large sums of money to satisfy and discharge the indebtedness of the corporation, they have in equity and at law a right to have their money refunded."

III.

As to the claim in the third cause of action, for services from the first day of May, 1886, to the 4th day of November, 1886, as superintendent and manager of the Construction Company of said railroad.

First—The allegation that on the 1st day of May, 1886, the defendant employed plaintiff to superintend the building of the Denver, Memphis & Atlantic Railroad, and that said plaintiff worked for said defendant as such manager and superintendent in the construction of said railroad from the 1st day of May to the 4th day of November, 1886, is not denied by the plaintiff in error in his answer.

Under our Code of Pleadings, see Compiled Statutes, section 134, page 757.

These allegations were taken as true. "Every material allegation of the petition not controverted by the answer shall, for the purpose of the action, be taken as true."

In Railroad Co. v. Howard, 7 Wallace, 412, the court say:

"Apart therefore from the effect of the judgments, those allegations must be taken as true, as they are not denied in the answer."

This point of plaintiff, like the second, is made again on a mistaken notion of facts. When they state on page 23 of brief, "There was no proof whatever, indeed no pretense

that defendant was liable to plaintiff for such services by virtue of any by-law or of any express contract," they say the claim is upon a *quantum meruit*. On the contrary, we say that there is no denial of the allegation that on the 1st of May the defendant employed plaintiff to superintend the building of the Denver, Memphis & Atlantic R. R., and that said plaintiff worked for such defendant as such manager and superintendent," making an express agreement; but there was no express agreement as to *amount* that he was to *receive during that time*.

Evidence.

Was what Mr. Fitzgerald did, for which he asks pay, the ordinary duty of a director? As to Thayer's evidence, page 95, in addition to that quoted in the brief of plaintiff in error, I will quote the following:

"Mr. Fitzgerald was in charge of the construction work. He was the man that furnished the funds for the Construction Company. He was the man who let the contracts for grading and represented the company in letting contracts. He furnished the men and implements to the company, sent them there and instructed them as to their duties, and notified me in regard to the instructions. He was in daily consultation with Mr. Mallory."

Further, on cross-examination, to the question, "You say between the 1st day of May, 1886, and November, 1886, Fitzgerald performed a great deal of work for the company?

"A. Yes, sir.

"Q. How much work did he do during the month of May, 1886?

"A. He performed the duties of general manager of the Fitzgerald & Mallory Construction Company."

On page 100:

"Q. How often was Mr. Fitzgerald on the work during the month of May, 1886?

"A. I presume he was there half the time.

"Q. Where was he the other half of the time?

"A. His business called him to Kansas City to purchase supplies, and sent men, and I don't know whether he was in Kansas City; he was on the line the greater part of the time.

"Q. Where was he in June?

"A. I couldn't say where he was in June, but he was attending to the business of the company.

"Q. What portion of the time was he on the work between the 1st day of May, 1886, and the 1st day of November, 1886?

"A. He was attending to the business of the company all the time; whether it was on the work or not, it is not necessary for a superior officer to be on the work.

"Q. What kind of work did he do?

"A. He spent a great deal of his time on the work, going up and down the line?

"Q. In a buggy?

"A. Yes, and on foot, in engines, superintending the track-laying, hiring men, etc."

It also appears that he did the same work between the 1st of May, 1886, to November, 1886, that he did afterward. On the 4th of November, 1886, the directors met and passed the following:

"On motion of Mr. Cross the salaries of the general manager and president of the Construction Company were fixed at $5,000 and $7,500 per year respectively." (See page 127.)

So the directors themselves admit that this was extraordinary work for which pay should be given.

It turned out that the New York directors were under the control of Sidney Dillon, Russell Sage, and George Gould, and they peremptorily fixed the salary at probably

less than half what it was worth to do the business that Mr. Fitzgerald was doing; whilst Mr. Fitzgerald objected to that, he still went on and did the work; but anyway the proof is clear that the same extraordinary work Mr. Fitzgerald did from May 1 to November 4, 1886, he did after that, which it was admitted was extraordinary work and he ought to be paid for it.

The plaintiffs in error claim in their answer that there was no agreement as to the amount Mr. Fitzgerald as manager should receive until November 4. (See record, page 25.) The court sustained the plaintiffs in error in this position, but held that if such work was done for the Construction Company, that we might amend our petition and show what it was reasonably worth from the 1st of May to the 4th of November, 1886, and the real question and only one presented to the court is, that Fitzgerald having been employed at the request of the company to do this work, and having done it, there being no *amount* agreed upon for his services, can he *recover a reasonable amount?*

The proposition maintained by plaintiffs in error, "that plaintiff cannot recover as upon an implied contract for services rendered by him as a director or officer of the defendant company," is *based on mistaken facts.* All that he did and for which after November 4, 1886, the directors paid him at the rate of $5,000 a year, and all that he did before that time for which he claimed pay, is outside of the duties as a director, and I might also add outside of his duties as a treasurer.

As Treasurer.

First—As to treasurer:

There is no allegation or proof that Mr. Fitzgerald was treasurer; he simply *acted as treasurer*, and his acts were *all* outside of his duties as *director*.

It is said no attempt was made to make any distinction between the plaintiff's services as superintendent or manager and as treasurer. The allegation as to treasurer is not that he was employed as treasurer, but that he also acted during that time as treasurer of said company, and was to *great expense* and *trouble* as such *treasurer*. It is for his expense and trouble. Now when you look at the evidence you will see that about all the evidence was that he furnished the *funds*. "He was the man that furnished the funds for the Construction Company."

On page 55 to question, Mr. Mallory says:

"In order to earn $50,000 of township bonds in Labette county, I went to New York and had a verbal understanding with the people there that we should go ahead and prosecute our arrangements in Kansas with the Denver, Memphis & Atlantic Company, and then to come back there to complete the work; in the meantime we had to start the work, and we had to borrow money, and the engineer drew upon Mr. Fitzgerald for money in order to keep the work in progress.

"Q. About how much did he furnish before money from other sources was procured?

"A. I cannot tell that; it amounted to somewhere between $5,000 and $10,000 at that time."

The contract referred to was the contract with the Missouri Pacific Railway Company. It had not been formally entered into, but agreed upon at this time. Now it appears that arrangement with the directors in New York, in order to save $50,000 of bonds, Mr. Mallory got Mr.

Fitzgerald to act as treasurer. He acted as such treasurer, procuring some $5,000 to $10,000, and was to expense and trouble in procuring it. His act put into the coffers of the company $50,000, and he simply asked to be paid for his expense and trouble in doing *this*. Now we think that this case is distinguished from the case of Holden v. Laf., B. & Miss. R. R. Co., 71 Ill. There is where the board of directors appoint one of their number as treasurer and made his duties as treasurer a part of his duties as director, and we think this case is distinguished from all of the cases, from the fact that the duties performed by Mr. Fitzgerald as acting treasurer were wholly outside of his duties as treasurer as laid down by the by-laws of the company. On page 122 of the record, sec. 6 of by-laws, the duties of treasurer are fully defined. There is no such duty imposed upon him as paying his own expenses and procuring money for the company which the company itself ought to have procured. This matter is entirely outside of the duties as treasurer or as director. It was made for the laudable purpose of putting $50,000 and it did put $50,000 into the treasury of the company, and the least the company could do would be to pay Mr. Fitzgerald for his expenses and trouble.

Plaintiff in error refers to the case of Wood v. Lost Lake & Michigan Co., 23 Pac. Rep., 848, and says the law on this subject is well summarized there. That case differs from this. That was for the salary of the president. The by-laws of the corporation provided "the salaries of the president, vice president, and comptroller shall be fixed by the board of directors." It also appeared that the board of directors had never fixed the salary for acting as president, and nothing was said nor any action taken by the

corporation in regard thereto, prior to the meeting of the directors before referred to, which was after services were rendered. In that case, contrary to the by-laws, no salary was fixed for the president, and the order made by the directors contravened the by-laws. Yet in that case they say: "If, however, services are performed by such director for the corporation, at its instance and request, in regard to mat'ers outside of the duties devolving upon him by virtue of his office or trust, then he is entitled to claim compensation therefor upon a *quantum meruit.*" Now the difference between the two cases is this, that there the salary was allowed contrary to the by-laws; here the by-laws define the duties of a treasurer, and we show what Mr. Fitzgerald did was entirely outside of any duties assigned to that officer.

The first authority under this head, quoted by plaintiff in error, we think, defines what is meant by work outside, and is an authority in our favor. That is the Citizen's Nat. Bank v. Elliott, 55 Iowa, 104, the court say:

"We understand the rule to be when an officer of a corporation performs the usual and ordinary duties of his office as defined by the charter or by-laws, he cannot recover compensation therefor, unless it has been specially agreed;" "but," it says, "it may be conceded for extraordinary services such as do not pertain to the office, there may be a recovery, although it has not been so especially agreed."

The other authorities carry out that theory. If the duties performed by Mr. Fitzgerald were not the ordinary duties of a director he can recover.

But if the plaintiff had asked to be paid as treasurer, we think that the weight of authority and the better authority is that laid down in one of the cases referred to by

plaintiff in error, viz., National Bank v. Drake, 29 Kansas, 350, a decision made by Justice BREWER when on the supreme bench of Kansas, in which he reviews all the authorities, most of those referred to by plaintiff in error, and then on page 330 says:

"We think the rule is, in the absence of positive restrictions, that where no salary is prescribed, one appointed to an executive office like that of cashier is entitled to reasonable compensation for his services, and that the directors have power to fix a salary after the expiration of the term of office, and this if such appointee is also a *director* and continues to be such while holding the independent office."

Second — As to duties performed as manager, such as procuring right of way, going along the track and seeing that the work was properly done, hiring men, subletting contracts, and seeing that the contractors performed their work; in other words, superintending the entire building of the 600 miles of railroad. This is all outside; there is nothing claimed; no evidence going to show that he makes any claim whatever for duties which attach to *his directorship*.

The law applicable to this case seems to be clearly laid down in Morawetz on Private Corporations, 518:

"But if the director is properly employed to perform services which do not pertain to his office as director, he is entitled to such compensation as has been agreed upon, or as such services are reasonably worth."

I quote this for the reason that under this head in support of this proposition the author cites very nearly all of the authorities cited by plaintiffs in error to maintain their views. We have already shown that some of these authorities define what is outside of his duties as director, and that they are the duties as defined by the charter or

by-laws of the company, and that these duties are all outside of those so defined.

The case of St. Louis, F. S. & W. R. Co. v. Tiernan, 15 Pa. R., 553, is a case somewhat in point, where a resolution was passed fixing salaries of officers not heretofore fixed, same as plaintiff's in this case to November 4, 1886. The resolution is as follows, see page 554:

"Whereas, The salaries of A. M. Ayers, president, F. Tiernan, vice president and general manager, J. D. Hill superintendent, and Ira J. Bronson, secretary and treasurer, not having been heretofore fixed, therefore it is resolved that the salaries of each of said officers be and the same are now fixed at $5,000 per annum from the 4th day of March, 1881, to March 7, 1882."

And again says on page 553:

"It is claimed that after the services had been performed by Tiernan as vice president of the company, without any express agreement as to their value and payment, the board of directors could not legally vote him a salary for past services. We do not think this objection fairly states the facts in this particular case, for this reason, that there is in the record some evidence tending to show that there was a common understanding among those persons who were actively engaged in the work of the company that they were to receive compensation for such services."

But in this case there is something more than a common understanding. The parties who have entire control of the work get Mr. Fitzgerald to act as manager to build the railroad, and we think in this case it can be fairly stated what was stated on page 553, in reference to resolution passed by the directors in that case:

"It may be fairly stated that the resolution of the board of directors of the company, passed on the tenth day of March, 1882, allowing salaries to the persons therein named, was but expressive of the common understanding

had at the commencement of the work, that they were to be paid a reasonable compensation for services rendered."

The resolution in this case was the general expression, as we think, that the manager was entitled to pay.

Again on page 559 it says:

"It has been decided that a director is not prohibited from dealing with his company; he can sell them real estate or any other kind of property, etc., etc."

But for the sake of argument let us admit that it was denied in the answer, and that it was necessary for us to prove an implied contract. We maintain this position:

"Corporations are placed upon the same footing in regard to their contracts, and the implications upon which they may be based, as natural persons."

Cicotte v. St. Anne's Church, 60 Mich., 557.

"The defendant was an attorney at law, and I think he might have been employed in his professional capacity to do the work he has charged for in his bill of particulars. He testifies that he declined to act as one of the trustees in the matter in which he claims to have performed the service for which he seeks payment. Certainly the services were not such as he was obliged to perform, either as committeeman or trustee, nor were they against the interest of the church for which they were performed."

"If the services claimed could be recovered for under a special contract, there can be no good reason given, I apprehend, why an implied liability may not arise for the performance of such service unless there is something in the circumstances of the case which necessarily repels or excludes such implication."

A number of authorities are stated in this case.

"It has been held in some cases that a director cannot enter into a valid contract with the corporation of which he is agent, although the corporation is represented in the transaction by a majority of the board. But the weight

of authority and of reason appears to indicate that such a contract would be valid."

In Gardner v. Butler, 30th New Jersey Equity Reports, page 721, the court say:

"But while the express undertaking is without legal force, the directors of a company have a right to serve it in the capacity of officers, agents, or employes, and for such services the law will enable them to recover a just and reasonable compensation. The law restrains them from making a contract where their own gain intervenes between their exercise of judgment and their duty as trustees, but it does not operate to deprive the company of the service of those who, in many cases, may alone possess the skill requisite to the successful management and conduct of the corporate business, and who may have the chiefest interest in its prosperity."

In this case it is shown that Mr. Fitzgerald is one of the most successful contractors in building railroads that there is, and the company availed itself of his ability, received his services right at the time they were most needed, namely, the commencement of the work, and they ought to pay for them.

Harts v. Brown, 77 Ill., 226–234.

I.

Point of error is as follows:

"It appears on the face of the record that error occurred in the entry of judgment for an amount in excess of the total sum claimed in the petition as reduced by the instructions of the court to the jury."

It is claimed that this point was raised in the motion for new trial, cause 5, transcript, page 45, and was overruled and then made a part of the bill of exceptions.

This is incorrect. The motion for a new trial is no part of the bill of exceptions. The bill of exceptions commenced on page 52. The motion for new trial is found on page 45 of transcript.

First—A motion for new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made a subject of exceptions.

Schuchard v. Allen, 1 Wall., 371.

Brown v. Clark, 4 Howard, 15.

The statement on this point by plaintiff in error seems to have been for the purpose of a confusion of figures. They state that the aggregate of the petition is $56,438.75, without any interest claimed; the prayer of the petition is for $51,271.85. This arises from the amendment of the petition. On record, page 114, after the evidence was all in, you will find that before adjourning, "both parties were given leave to amend their petitions to conform to the facts." This is done under the code, which says that pleadings can be amended at any time. In the amendment of the pleadings, take for instance the third cause, the prayer is there put into the pleading praying judgment and interest. The law says that on all money falling due, interest shall be allowed from the time the money fell due or the services were performed.

The fifth cause was amended and interest asked on that, so that the prayer under each pleading was for $56,438.75, with interest running from different periods.

Fourteenth Cause of Action.

But as to the fourteenth cause of action, it needs some explanation. Mr. Fitzgerald, at the time the answer was drawn, had misplaced his book showing what his expenses had been, and money expended by him and paid out since January, 1888. In other words, for money paid out and expenses which had never been settled for. Plaintiff put in the claim of $5,000, and plaintiff in error asked the court to instruct the jury that these claims were all for money paid and expenses incurred by the plaintiff prior to the organization of the corporation, the same as the first clause in the third cause of *action*. That was for work done prior to its organization. The court did instruct the jury to that effect, but on being reminded that the fourteenth cause was for money paid out and for expenses incurred after the organization, it verbally modified it and said the jury might find what it desired. The proof clearly shows:

First—On or about the 29th of June, 1888, which was long after the work was performed, Mr. Fitzgerald paid for the company $336.00, amount of royalty claimed for the use of trams during the time the work was done for the company, and he reports this to the company. (See page 165.) On page 106 it is clearly shown that he went around doing business for the company and expended some $700 for them after January, 1888, and there is no objection to this evidence showing these expenses.

Besides these *two claims* which were covered by the 14th cause of action, Mr. Fitzgerald had paid a lot of interest on the notes on renewal; for instance, we take the note in

the 2d cause of action, $15,290 *and something*, this note ran for three months and was then renewed. Across the face of the notes in red ink showed the amount of interest that *he* paid saying, "Interest paid." The transcript does not show this. So that the copies of the notes given in the transcript as printed do not show these amounts; yet they appeared as so much *paid* by him. There were some $600 of these. If the jury allowed it, the principal would be about what they stated it in their verdict, $47,937.97. Now, owing to this fact that the record does not show this, it may be that I ought not to claim anything in reference to it; but as to the two items of $336, paid for royalty on tram, which was used by the Construction Company, and the royalty was for the use while they owned it, and for the $700 of expenses paid by him, all being paid after January, 1888, there is no disputing evidence and there was no exception to the evidence; these ought to be allowed. We find that the jury might have found $52,872.33, $1,400 more than they did allow.

Interest.

Under our law, all money loaned or due shall bear interest. Now I have had the accounts carefully calculated up and all of them are upon instruments, except a few small accounts, which expressly draw interest. The accounts for wages and for expenses, under our law, draw interest from the time they ought to be paid. The jury were expressly instructed by the court to allow interest from the time the debt ought to have been paid to the present time, and then make one finding including principal and interest in one. This is what the court told them to do and there were no exceptions to that. Now if they

had followed that, they could have allowed, after allowing nothing for the 14th cause of action, but simply giving interest as the law required and as instructed by the judge, $51,760.50; this would have been simply allowing interest on the $46,438.95 from the time the court instructed them to allow it. Had they allowed simply the two sums about which there is no dispute — one that Mr. Fitzgerald paid, and for his expenses incurred since January, 1888, with interest on the same from the time it ought to have been paid — we would add to the amount $1,111.83, making $52,872.33 — $1,400 more than the jury did allow. This may have happened by cutting down Mr. Fitzgerald over $1,400 on his claim for wages from May till November, 1886.

It is evident that the jury made a mistake in summing up this interest, and did not follow the instructions of the court. Interest on a note of hand, and on money due is just as much a part of the debt as the principal, and it would be error for the jury to find the principal and not the interest; yet here they find the principal to be $47,937.97, and the interest to be $3,474.65, while the interest was more than $5,000. Now if anything, on the face of this, the jury made some mistake; but it was a mistake which inured to the benefit of plaintiff in error. Such mistakes are often made in jury rooms. If the jury had allowed the principal as claimed in the 14th cause of action, which they might have done, their statement of the principal was correct, but the interest which was absolutely due, and just as much due the plaintiff as the principal, would be over $2,000 less than what it was; but in any statement you make of it, the error is in favor of the plaintiff in error and it is not one that can now be urged, and although

we might admit, for the sake of argument, that the judge did instruct the jury, evidently by mistake, that they could not allow for these expenses, and for this money paid out, because it was paid out before the corporation, yet when the question is presented to him on a new trial, the jury having allowed it, he sees the injustice of his own instruction and uses the discretion which every court ought to use, and refuses a new trial. This would be right, and it would be justice, and, we think, in accordance with the authorities of the United States. In other words, the jury was right and he was wrong, and in the language of the court in 1 Wallace, 371, "If the motion for a new trial were before us, we should overrule it. In our opinion right and justice *have been done*." That was the position the court held, that right and justice was done in allowing this claim.

The whole matter of formality of verdict and amount was left to the sound discretion of the judge who tried the case, and he doubtless found, as this court will find, that the mistake was made in favor of the plaintiff in error and that there are no exceptions or anything here which shows any error in the matter of the amount of the verdict.

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